

[Cite as *State v. Johnson*, 2010-Ohio-2838.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
GREENE COUNTY**

STATE OF OHIO	:	
	:	Appellate Case Nos. 09-CA-16
Plaintiff-Appellee	:	10-CA-07
	:	
v.	:	Trial Court Case No. 08-CR-793
	:	
BRIAN K. JOHNSON	:	
	:	(Criminal Appeal from
Defendant-Appellant	:	Common Pleas Court)
	:	

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OPINION

Rendered on the 18<sup>th</sup> day of June, 2010.

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BROGAN, J.

{¶ 1} This matter comes before us on two related appeals involving Greene County Common Pleas Court Case No. 08-CR-793. The first appeal, Greene App. No. 09-CA-16, is defendant Brian K. Johnson's direct appeal from his conviction and

sentence following a guilty plea to fourth-degree felony domestic violence. The second appeal, Greene App. No. 10-CA-07, is Johnson's appeal from the trial court's denial of a petition for post-conviction relief in the same case.<sup>1</sup> As a means of analysis, we first will address Johnson's direct appeal. We then will consider his appeal from the trial court's denial of post-conviction relief.

### **I. Direct Appeal**

{¶ 2} Johnson advances three assignments of error in his direct appeal. First, he contends his indictment is fatally defective because it omits the date of a prior domestic violence conviction. Second, he claims his guilty plea is invalid because the trial court failed to inform him of his right to jury unanimity. Third, he asserts that his maximum sentence is unlawful absent findings from the trial court under R.C. 2929.14.

{¶ 3} The record reflects that Johnson was indicted in November 2008 on a domestic violence charge. The indictment alleged that he had a prior domestic violence conviction in Xenia Municipal Court in case number 08 CRB 00043, but did not specify the date of that conviction. Due to the prior conviction, the indictment charged the current offense as a fourth-degree felony. Following a hearing, Johnson entered a guilty plea. The trial court imposed a statutory maximum prison sentence of eighteen months. This appeal followed.

{¶ 4} In his first assignment of error, Johnson contends R.C. 2941.11

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<sup>1</sup>After Johnson filed his direct appeal, we remanded the case for the limited purpose of allowing the trial court to resolve the petition for post-conviction relief. After the trial court denied the petition, we consolidated Johnson's direct appeal with his appeal from the denial of post-conviction relief.

required his indictment to include the date of his prior domestic violence conviction. The statute provides: “Whenever it is necessary to allege a prior conviction of the accused in an indictment or information, it is sufficient to allege that the accused was, at a certain stated time, in a certain stated court, convicted of a certain stated offense, giving the name of the offense, or stating the substantial elements thereof.”

{¶ 5} We are unpersuaded by Johnson’s argument for two reasons. First, he waived his objection to the alleged defect in his indictment by pleading guilty. See, e.g., *State v. Moxley*, Montgomery App. No. 22889, 2009-Ohio-3767, ¶9 (recognizing that “by entering a guilty plea, an accused admits guilt of a substantive crime and waives any alleged indictment defects for purposes of appeal”). Second, we specifically have rejected Johnson’s argument that the date of a prior conviction must be included in an indictment when the fact of a prior conviction is an element of the offense. See, e.g., *State v. Tooson*, Montgomery App. No. 23290, 2009-Ohio-6269, ¶19-22.<sup>2</sup> Accordingly, the first assignment of error is overruled.

{¶ 6} In his second assignment of error, Johnson claims his guilty plea is invalid because the trial court failed to inform him of his right to jury unanimity. We recently ruled, however, that a trial court is not required to advise a defendant of his right to a unanimous jury verdict. *State v. Crowder*, Montgomery App. No. 23184, 2009-Ohio-6389, ¶7-8, citing, inter alia, *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, ¶68. Accordingly, the second assignment of error is overruled.

{¶ 7} In his third assignment of error, Johnson asserts that his maximum

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<sup>2</sup>In *Tooson*, we cited R.C. 2941.22 rather than R.C. 2941.11. Our analysis in *Tooson* makes clear, however, that we actually were quoting from and discussing R.C. 2941.11 rather than R.C. 2941.22, which had nothing to do with the issue in that case.

sentence is unlawful absent findings from the trial court under R.C. 2929.14. Although the Ohio Supreme Court eliminated the need for such findings in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, Johnson contends *Foster* is no longer viable after *Oregon v. Ice* (2009), \_\_\_ U.S. \_\_\_, 129 S.Ct. 711. *Ice* merely held, however, that judicial fact-finding is not prohibited when a trial court imposes consecutive sentences. Accordingly, we overrule Johnson's third assignment of error.<sup>3</sup> The trial court's judgment entry of conviction and sentence is affirmed.

## II. Denial of Post-Conviction Relief

{¶ 8} On July 29, 2009, Johnson filed a combined Crim.R. 32.1 motion to withdraw his guilty plea and an R.C. 2953.21 petition for post-conviction relief. On November 3, 2009, we stayed Johnson's direct appeal and remanded the case to the trial court for the limited purpose of resolving the petition for post-conviction relief. In compliance with our mandate, the trial court limited its review to the post-conviction relief issue and did not address Johnson's Crim.R. 32.1 motion to withdraw his guilty plea.<sup>4</sup> On January 6, 2010, the trial court overruled the petition for post-conviction

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<sup>3</sup> Parenthetically, we note that the Ohio Supreme Court recently accepted jurisdiction in a case to address *Ice's* application to *Foster*, at least with regard to judicial fact-finding and the imposition of consecutive sentences. See *State v. Hodge*, 124 Ohio St.3d 1472, 2010-Ohio-354. In a prior case, *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, the Ohio Supreme Court acknowledged *Ice* but declined to discuss its ramifications because neither party had briefed the issue. *Id.* at ¶35.

<sup>4</sup> In *State v. Spencer*, Clark App. No. 2006 CA 42, 2007-Ohio-2140, we determined that actions expressly brought under Crim.R. 32.1 and R.C. 2953.21 are distinct. Therefore, a motion to withdraw a plea under Crim.R. 32.1 may not be treated as a petition for post-conviction relief under R.C. 2953.21. *Id.* at ¶11. Although Johnson's combined filing sought relief under both Crim.R. 32.1 and R.C. 2953.21, the trial court addressed only the post-conviction relief question. In so doing, it adhered to our remand "for the limited purpose of the trial court's consideration of the pending petition for post-conviction relief."

relief without an evidentiary hearing. This appeal followed.

{¶ 9} Petitions for post-conviction relief are governed by R.C. 2953.21, et seq. The post-conviction relief process is a civil, collateral attack on a criminal judgment. *State v. Calhoun*, 86 Ohio St.3d 279, 281, 1999-Ohio-102. To obtain an evidentiary hearing on a petition for post-conviction relief, a defendant bears the burden of providing evidence to demonstrate a cognizable claim of constitutional error. R.C. 2953.21(C). A trial court may deny a petition for post-conviction relief without conducting an evidentiary hearing if the petition, supporting evidence, and the record fail to demonstrate facts sufficient to establish substantive grounds for relief. *Id.*, paragraph two of the syllabus.

{¶ 10} In his petition, Johnson raised several arguments. First, he claimed his indictment was defective because it omitted the date of his prior conviction. Second, he argued that his plea was invalid because (1) he was not informed of the defective indictment, (2) he was not informed that he was waiving his right to a unanimous jury, (3) he was “led to believe by trial counsel that he would receive probation if he pled,” and (4) his trial counsel had a conflict of interest. Third, Johnson asserted that he was innocent and that his attorney failed to advise him of the law.

{¶ 11} In support of his petition, Johnson provided two affidavits: one from himself and one from attorney William Daly. In his affidavit, Johnson averred that he had been represented in the trial court by attorney Scott Ashelman. Johnson further averred:

{¶ 12} “During the pendency of this case and prior to my plea, I informed Mr. Ashelman that I desired to maintain my innocence and proceed to trial;

{¶ 13} “Mr. Ashelman was insistent that I enter a plea and led me to believe that I would receive probation in the event that I did enter a plea;

{¶ 14} “With respect to the incident involving my sister, Stacy Johnson, and which became the subject of the charge of domestic violence for which I was indicted in the aforementioned case, while I did push her, I did not cause or attempt to cause any physical harm to her, nor did I threaten to, I had no intent to do so and I did not commit any act which was either calculated or likely to cause her any physical harm or the fear of such;

{¶ 15} “Mr. Ashelman did not advise me that pushing a person in the absence of physical harm does not necessarily amount to causing or attempting to cause physical harm to another under Ohio law and that it is the intent of the person doing the pushing along with all of the facts and circumstances of the case which would determine whether such an act may or may not constitute an assault under Ohio law;

{¶ 16} “Neither did Mr. Ashelman advise me that my right to a trial by jury included the right not to be convicted unless all 12 jurors voted unanimously to convict me;

{¶ 17} “It has come to my attention that the indictment in my case was legally insufficient and had I known that such was the case I never would have entered a plea;

{¶ 18} “It has come to my attention that Mr. Ashelman, while representing me in the aforementioned case, may also have been serving as an Assistant City Attorney/Prosecutor for the City of Beavercreek, Ohio and may have prosecuted criminal cases in the Fairborn Municipal Court, both of which jurisdictions I believe

are in Greene County, Ohio;

{¶ 19} “Had I known that Mr. Ashelman was working as a prosecutor in Greene County, Ohio at the same time that he was representing me in the same county on criminal charges, I would have objected to his representation of me, I would not have listened to his advice to enter a plea and I would not have entered a plea with him as my attorney;

{¶ 20} “Had I been properly advised of my right not to be convicted unless by a unanimous jury verdict, the right not to be prosecuted and convicted unless first indicted by a grand jury, the right not to be prosecuted and convicted without a legally sufficient indictment and on the law of domestic violence, and specifically on the law relating to causing or attempting to cause physical harm as referenced above, I would have maintained my innocence and proceeded to trial[.]”

{¶ 21} In the second affidavit supporting Johnson’s petition, attorney William Daly averred in relevant part as follows:

{¶ 22} “I have reviewed the case of **State of Ohio v. Brian K. Johnson**, Greene County Common Pleas Court Case No. 2008-CR-0793, wherein Mr. Johnson was represented through his plea and sentencing by Attorney Scott A. Ashelman;

{¶ 23} “I am personally acquainted with Attorney Ashelman and have practiced law in Greene County, Ohio, to include in the Fairborn Municipal Court and the Greene County Common Pleas Court;

{¶ 24} “During the time that Mr. Ashelman represented Mr. Johnson in the referenced matter, Mr. Ashelman was employed as an assistant city attorney/prosecutor with the city of Beavercreek, Ohio, which is located in Greene

County;

{¶ 25} “The Office of the Beavercreek City Attorney/Prosecutor by which Mr. Ashelman was so employed handles adult felony criminal cases filed by the Beavercreek Police Department in the Fairborn Municipal Court at the initial appearance/preliminary hearing stage;

{¶ 26} “After either a bindover or a dismissal for a direct future indictment as the case may be in any such adult felony criminal case filed in the Fairborn Municipal Court by the Beavercreek Police Department, any such case so bound over or dismissed for a direct future indictment is then transferred to the Office of the Greene County Prosecuting Attorney for presentation to the Greene County Grand Jury for indictment and prosecution in the Court of Common Pleas of Greene County, Ohio;

{¶ 27} “I am personally aware that Attorney Ashelman has been both the Assistant Fairborn Municipal Court Prosecutor in the referenced manner while contemporaneously serving as appointed defense counsel on the Greene County court-appointed attorney list[.]”

{¶ 28} The State opposed Johnson’s petition. Its filing included affidavits from attorney Ashelman and Greene County Prosecutor Stephen Haller. In his affidavit, Ashelman averred:

{¶ 29} “1. I represented Brian K. Johnson, in Greene County Common Pleas Court No 08 CR 793, from November of 2008 through January of 2009.

{¶ 30} “2. During this time, I never represented the State of Ohio in any felony case in Greene County, Ohio, including in Fairborn Municipal Court and Xenia Municipal Court.

{¶ 31} “3. During this time, I did cover occasional hearings for Dennis Adkins, who represents the City of Beavercreek, Ohio, in Fairborn Municipal Court, but those cases were misdemeanor cases or traffic cases, and I was never under a contract with the City or State of Ohio.

{¶ 32} “4. During this time, I never served as a Prosecutor in any capacity in Xenia Municipal Court, which is the jurisdiction where both Brian Johnson’s instant case and his previous conviction are based.”

{¶ 33} In his affidavit, prosecutor Haller averred:

{¶ 34} “1. Chapter 309 of the Ohio Revised Code confers upon my office the power to prosecute all felony cases in Greene County, Ohio.

{¶ 35} “2. My office handles all felony cases, including preliminary hearings in both municipal courts in Greene County, Ohio. I do not contract with the municipal prosecutors to handle either preliminary hearings or arraignments.

{¶ 36} “3. To the best of my knowledge and belief, no prosecutor is present on behalf of my office at felony arraignments in either Xenia or Fairborn Municipal Court, as bond recommendations are made via letter to the court with the charging documents.

{¶ 37} “4. To the best of my knowledge and belief, from November of 2008 through January of 2009, Scott A. Ashelman was not appointed as a special prosecutor in my office.”

{¶ 38} On January 6, 2010, the trial court overruled Johnson’s petition without a hearing. It found that “[t]he Defendant did not demonstrate a constitutional deprivation nor did the Defendant present competent, relevant, and material

evidence, and sufficient operative facts to justify the granting of a hearing[,] as the credibility of the Defendant's affidavits [is] in question." The trial court further found that there was no ineffective assistance of counsel, that Johnson's guilty plea waived any defect in his indictment, that the State's affidavits established no conflict of interest, and that attorney Ashelman "did not handle felony cases for the State of Ohio."

{¶ 39} In his first assignment of error, Johnson contends the trial court erred in convicting him "of a crime for which he was not indicted and of which he is factually innocent." He raises two arguments in support. The first involves his indictment's omission of the date of his prior conviction. The second involves his claim he did not cause or attempt to cause physical harm to the victim.

{¶ 40} We find both arguments to be unpersuasive. With regard to the first argument, we determined above the Johnson waived any defect in the indictment by pleading guilty and, in any event, that the date of a prior conviction need not be included in an indictment. We note too that the adequacy of Johnson's indictment is not a proper subject for post-conviction relief, as the issue was raised in his direct appeal. *State v. Skatzes*, Montgomery App. Nos. 22322, 22484, 2008-Ohio-5387, ¶6 (recognizing that in post-conviction proceedings res judicata bars any claim that was or could have been raised on direct appeal). As to the second argument, Johnson's claim of factual innocence is belied by the record. During his plea hearing, Johnson expressly admitted that he "did knowingly cause or attempt to cause physical harm to a family or household member[.]" (Plea transcript at 11-12). This directly contradicts the claim in his affidavit that he did not knowingly cause or attempt to cause physical

harm to his sister, the victim of his domestic violence. It is well settled that a defendant is not entitled to post-conviction relief, or even a hearing, when his claim is contradicted by the record and unsupported by operative facts other than his own self-serving affidavit and statements in his petition. See, e.g., *State v. Harris*, Champaign App. No. 07-CA-32, 2008-Ohio-5165, ¶7. Accordingly, Johnson's first assignment of error is overruled.

{¶ 41} In his second assignment of error, Johnson alleges ineffective assistance of counsel based on "the erroneous advice and omissions of trial counsel who had a conflict of interest and who failed to advise the client that the indictment was defective, that he was factually innocent and that the jury had to be unanimous to convict him[.]" This assignment of error alleges that attorney Ashelman (1) failed to disclose his alleged conflict of interest, (2) failed to inform Johnson that the indictment was defective, (3) failed to advise Johnson that he was factually innocent, and (4) failed to advise Johnson that the jury had to be unanimous.

{¶ 42} We are unpersuaded by Johnson's arguments. In our resolution of the direct appeal above, we determined that the State was not required to include the date of his prior conviction in the indictment and that Johnson was not required to be told about jury unanimity. Therefore, Johnson cannot demonstrate ineffective assistance of counsel even if, as alleged in his affidavit, counsel failed to inform him about these things.

{¶ 43} We are equally unpersuaded by Johnson's claim that his attorney provided ineffective assistance by failing to inform him that he was innocent. No facts in the record establish that Johnson in fact was innocent. In his affidavit, Johnson

averred that attorney “Ashelman did not advise me that pushing a person in the absence of physical harm does not necessarily amount to causing or attempting to cause physical harm[.]” Be that as it may, Johnson admitted during his plea hearing that he “*did* knowingly cause or attempt to cause physical harm” to his sister. (Emphasis added). Moreover, he admitted that Ashelman had answered any questions he had about the charge in the indictment. (Plea transcript at 5). In his petition to enter a guilty plea, Johnson further admitted that he had read the indictment, that he had discussed it with his lawyer, that he fully understood the charge against him and the elements it contained, and that he was pleading guilty because he was guilty. (Doc. #17). These representations contradict Johnson’s claim of factual innocence. Therefore, the trial court did not err in rejecting his argument without an evidentiary hearing. *Harris*, supra, at ¶7.

{¶ 44} Finally, Johnson has not demonstrated ineffective assistance of counsel based on an alleged conflict of interest. “In order to satisfy a Sixth Amendment claim of ineffective assistance of counsel, appellant must demonstrate that an actual conflict of interest adversely affected his counsel's performance.” *State v. Keith*, 79 Ohio St.3d 514, 535, 1997-Ohio-367; see, also, *State v. Buhrman* (Sept. 12, 1997), Montgomery App. No. 96 CA 145 (recognizing that to establish ineffective assistance of counsel based on a conflict of interest, a defendant must show an actual conflict, rather than a potential conflict, and show that the conflict adversely affected counsel's representation).

{¶ 45} In finding no conflict of interest in the present case, the trial court evaluated the competing affidavits and opined that the credibility of the affidavits

provided by Johnson was “in question.” The trial court then accepted the representations in the affidavits provided by the State. It concluded that the State’s affidavits established the absence of a conflict of interest in Ashelman’s representation of Johnson.

{¶ 46} The Ohio Supreme Court has held that “in reviewing a petition for postconviction relief filed pursuant to R.C. 2953.21, a trial court should give due deference to affidavits sworn to under oath and filed in support of the petition, but may, in the sound exercise of discretion, judge their credibility in determining whether to accept the affidavits as true statements of fact.” *Calhoun*, 86 Ohio St.3d at 284. “The trial court may, under appropriate circumstances in postconviction relief proceedings, deem affidavit testimony to lack credibility without first observing or examining the affiant.” *Id.*

{¶ 47} In evaluating the credibility of affidavits in post-conviction proceedings, a court should consider all relevant factors, including “(1) whether the judge reviewing the post-conviction relief petition also presided at the trial, (2) whether multiple affidavits contain nearly identical language, or otherwise appear to have been drafted by the same person, (3) whether the affidavits contain or rely on hearsay, (4) whether the affiants are relatives of the petitioner, or otherwise interested in the success of the petitioner’s efforts, and (5) whether the affidavits contradict evidence proffered by the defense at trial. Moreover, a trial court may find sworn testimony in an affidavit to be contradicted by evidence in the record by the same witness, or to be internally inconsistent, thereby weakening the credibility of that testimony.” *Id.* at 285. “Depending on the entire record, one or more of these or other factors may be

sufficient to justify the conclusion that an affidavit asserting information outside the record lacks credibility. Such a decision should be within the discretion of the trial court. A trial court that discounts the credibility of sworn affidavits should include an explanation of its basis for doing so in its findings of fact and conclusions of law, in order that meaningful appellate review may occur.” Id.

{¶ 48} In the present case, the trial court did not explain why it questioned the credibility of the affidavits provided by Johnson. For purposes of his conflict-of-interest argument, the critical affidavit was from attorney William Daly.<sup>5</sup> He averred that he had personal knowledge of Ashelman working simultaneously as both a Fairborn assistant municipal prosecutor and as court-appointed defense counsel. He further averred that Ashelman worked as an assistant city attorney/prosecutor for the City of Beavercreek while representing Johnson. Finally, he averred that the office of the Beavercreek city attorney/prosecutor handles initial appearances and preliminary hearings in adult felony cases in Fairborn Municipal Court.

{¶ 49} We see no readily apparent reason to question the veracity of the foregoing averments made by a licensed attorney, an officer of the court. This does not mean, however, that the trial court was required to hold a hearing to determine whether Daly’s allegations were true. “[N]ot all affidavits accompanying a

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<sup>5</sup>In his own affidavit, Johnson stated that it had “come to [his] attention” that attorney Ashelman “may also have been serving as an Assistant City Attorney/Prosecutor \* \* \* and may have prosecuted criminal cases in the Fairborn Municipal Court.” Johnson did not purport to have first-hand knowledge, however, and presumably obtained his information from Daly, who did claim to have first-hand knowledge.

postconviction relief petition demonstrate entitlement to an evidentiary hearing, even assuming the truthfulness of their contents. Thus, where a petitioner relies upon affidavit testimony as the basis of entitlement to postconviction relief, and the information in the affidavit, even if true, does not rise to the level of demonstrating a constitutional violation, then the actual truth or falsity of the affidavit is inconsequential.” *Calhoun*, 86 Ohio St.3d at 284. We find that to be the case here.

{¶ 50} Daly essentially alleged that Ashelman did some prosecutorial work in Fairborn Municipal Court while representing Johnson. Although Daly also averred that the Beavercreek city prosecutor’s office performed some preliminary felony work, he did not assert that Ashelman personally had done any prosecutorial work in felony cases. For his part, Ashelman admitted in his affidavit that he had covered hearings for a Beavercreek city prosecutor in Fairborn Municipal Court. Ashelman averred, however, that he represented the City of Beavercreek, not the State of Ohio, and that all of the cases were traffic offenses or other misdemeanors. He stated that he never did prosecutorial work in any felony case while representing Johnson and that he never did any prosecutorial work in Xenia Municipal Court, which is where Johnson’s case was “based.” Nothing in Daly’s affidavit states otherwise. In short, a close reading of the affidavits of Daly and Ashelman reveals that they do not conflict on any material points. Read together, both affidavits support a finding that Ashelman performed some misdemeanor work on behalf of the City of Beavercreek in Fairborn Municipal Court while he was defending Johnson against charges brought by the State of Ohio in Greene County Common Pleas Court.

{¶ 51} Having reviewed the parties’ affidavits, we find no evidence of an actual

conflict of interest that adversely affected Ashelman's performance in Johnson's case. An actual conflict exists when counsel's duty to one client causes him to take a position that his duty to another client requires him to oppose. *State v. Manross* (1988), 40 Ohio St.3d 180, 182. The affidavits reflect that Ashelman performed part-time work covering misdemeanor hearings for a city prosecutor. His representation of Johnson involved a different jurisdiction, Greene County, and a felony case brought by the State of Ohio. We see no suggestion of an actual conflict between Ashelman's occasional misdemeanor work on behalf of Beavercreek and Fairborn in municipal court and his unrelated court-appointed work for Johnson in Greene County Common Pleas Court.<sup>6</sup>

{¶ 52} Even assuming, arguendo, that a real conflict did exist, post-conviction relief is unwarranted unless the conflict adversely affected Ashelman's performance in Johnson's case. *Keith*, 79 Ohio St.3d at 535. The record contains no evidence to support such a finding. Ashelman negotiated a plea deal that required Johnson to plead guilty in exchange for the State's recommendation of community control. Although the trial court ultimately declined to follow the State's recommendation, we

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<sup>6</sup>In opposition to this conclusion, Johnson cites Sup. Ct. Bd. of Commrs. on Grievances and Discipline Op. No. 88-008, an advisory opinion, for the proposition that municipal prosecutors may not represent criminal defendants in the county where they prosecute. The Board of Commissioners on Grievances and Discipline recently addressed Opinion No. 88-088 and recognized that it did not necessarily prevent a part-time city prosecutor from representing criminal defendants against the State of Ohio in their private practice. See Sup. Ct. Bd. of Commrs. on Grievances and Discipline Op. No. 2008-6 (recognizing that municipal attorneys who prosecute violations of municipal ordinances may represent criminal defendants when no municipal police officers from the municipality are involved, the criminal charges are based on alleged violations of state law, and the municipality is not directly or indirectly involved or affected).

see nothing about the deal, or anything else in the record, to support a finding that Ashelman would have done a better job for Johnson but for his part-time municipal court prosecutorial work. Therefore, Johnson has failed to raise a viable claim of ineffective assistance of counsel based on a conflict of interest. Accordingly, his second assignment of error is overruled.

{¶ 53} In his third assignment of error, Johnson contends the trial court erred in refusing to allow him to withdraw his guilty plea “to a defective indictment under circumstances which displayed his factual innocence and a conflict of interest with trial counsel who induced his plea by erroneous advice and omissions.”

{¶ 54} We note that this assignment of error is directed toward Johnson’s Crim.R. 32.1 motion to withdraw his guilty plea. He applies the manifest-injustice standard of Crim.R. 32.1 and argues that he should be allowed to withdraw his plea post-sentencing. Our prior remand and the trial court’s ruling were limited, however, to the issue of post-conviction relief under R.C. 2953.21. In the ruling from which Johnson has appealed, the trial court did not address his Crim.R. 32.1 motion to withdraw his guilty plea or whether a manifest injustice had been established. Therefore, the issue is not properly before us.<sup>7</sup> Accordingly, Johnson’s third assignment of error is overruled. The trial court’s judgment denying post-conviction relief is affirmed.

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FAIN, J., and FROELICH, J., concur.

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<sup>7</sup> Parenthetically, we note that Johnson’s manifest-injustice arguments raise the same issues that we have rejected herein in the context of his petition for post-conviction relief.

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