COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

ARTHUR RUFFIN

Defendant-Appellant

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. Sheila G. Farmer, J.
Hon. Patricia A. Delaney, J.

Case No. 2014CA00137

O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of Common Pleas Court, Case No. 2013CR1201

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: August 24, 2015

APPEARANCES:

For Plaintiff-Appellee

JOHN D. FERRERO,
Prosecuting Attorney,
Stark County, Ohio
By: KATHLEEN O. TATARSKY
Assistant Prosecuting Attorney
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For Defendant-Appellant

ARTHUR RUFFIN, PRO SE
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Hoffman, P.J.

{Â¶1} Defendant-appellant Arthur Ruffin appeals the judgment entered by the Stark County Court of Common Pleas, which denied his motion to vacate plea. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE CASE AND FACTS

{Â¶2} On September 23, 2013, the Stark County Grand Jury indicted Appellant on one count of domestic violence, in violation of R.C. 2919.25(A). The charge was enhanced to a felony of the third degree as Appellant previously had pleaded guilty to or been convicted of two or more domestic violence charges. The charge arose after Appellant hit and kicked his former live-in girlfriend on May 26, 2013, causing visible injuries to her face. Appellant entered a plea of not guilty at his arraignment on October 18, 2013.

{Â¶3} On December 23, 2013, Appellant, through counsel, filed a motion to disallow the stateâ€™s use of a prior aggravated assault conviction as well as a prior uncounseled conviction for enhancement, and to dismiss the indictment. The trial court denied the motion via Judgment Entry filed February 24, 2014.

{Â¶4} Appellant appeared before the trial court on February 25, 2014, withdrew his former plea of not guilty and entered a plea of guilty to the charge. The trial court ordered a presentence investigation, and scheduled a sentencing hearing on March 17, 2014. According to the Crim. R. 11 plea form executed by Appellant, Appellant indicated he had complete confidence in his attorney, and it was solely his own choice to enter a plea of guilty with full knowledge of the other alternatives available to him.

{Â¶5} On March 17, 2014, the trial court sentenced Appellant to community control. The Criminal Hearing Sheet filed March 18, 2014, states, â€œCOMMUNITY CONTROL GRANTED ENTRY TO FOLLOWâ€. The trial court filed the sentencing entry on April 2, 2014. The trial court appointed Attorney Jacob Will to represent Appellant on appeal.

{Â¶6} Prior to the filing of the sentencing entry by the trial court, the probation department filed a motion to revoke probation on March 31, 2014. The motion was based upon Appellantâ€™s being arrested and charged with domestic violence and disrupting public services on March 29, 2014 (Stark County Case No. 2014CR0538), as well as Appellantâ€™s failure to comply with the conditions of house arrest. Appellant was ultimately found guilty in Case No. 2014CR0538 and sentenced to 36 months in prison.

{Â¶7} Appellant filed a motion to vacate plea on May 16, 2014, and an amended motion to vacate plea on May 19, 2014. After several continuances, the trial court conducted an evidentiary hearing on the motion to revoke probation on June 16, 2014. The trial court revoked Appellantâ€™s community control and sentenced him to a period of incarceration of 24 months, to be served consecutive to the 36 month sentence in Case No. 2014CR0538. The trial court memorialized its decision via judgment entry filed June 26, 2014.

{Â¶8} Appellant filed a pro-se Notice of Appeal on July 25, 2014. Appellant filed a motion for appointment of counsel on the same day. Via Judgment Entry filed November 7, 2014, the trial court indicated it had appointed Attorney Will on March 20, 2014, to represent Appellant in the appeal of the instant action, and then appointed Attorney Will to

represent Appellant in the pending appeal. The trial court noted Attorney Will had filed a motion to vacate plea and an amended motion to vacate plea, but Appellant had filed his pro-se appeal prior to the trial courtâ€™s ruling on said motions; therefore, the trial court was divested of jurisdiction and could not rule on such.
{Â¶9} Via Judgment Entry filed January 21, 2015, this Court dismissed Appellantâ€™s appeal for want of prosecution. However, we reinstated the matter due to the fact Attorney Will was unaware of his appointment as counsel for Appellant. March 23, 2015 Judgment Entry. Attorney Will filed a motion to withdraw, which this Court granted. We remanded the case to the trial court for appointment of replacement counsel. The trial court appointed Kristine Beard. Appellant subsequently advised this Court he wished to represent himself, and Attorney Beard was removed as counsel of record. April 27, 2015 Judgment Entry.
{Â¶10} Appellant filed his pro-se brief on June 1, 2015, assigning the following errors:
{Â¶11} "I. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN NOT FURTHER INQUIRING IN THE PROBATION VIOLATION, SENTENCING THE APPELLANT TO CONSECUTIVE SENTENCES, FOR A VIOLATION OCCURRING BEFORE SENTENCE BEING JOURNALIZED BY THE CLERK, VIOLATING THE APPELLANT'S RIGHT TO DUE PROCESS UNDER CRIM R 32(C).
{Â¶12} "II. COURT ERRED, BY NOT HOLDING A HEARING ON MOTION TO VACATE PLEA. VIOLATING APPELLANT'S RIGHT TO DUE PROCESS.
{Â¶13} "III. STATEMENT OF CONSTITUTION CLAIM APPELLANT'S EXPLICIT RIGHT EFFECTIVE COUNSEL UNDER THE 6TH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE 10 OF THE OHIO CONSTITUTION WAS VIOLATED."
I
{Â¶14} In his first assignment of error, Appellant argues the trial court erred and abused its discretion in failing to make further inquiry into the probation violation, in sentencing him to consecutive terms of imprisonment for a violation which occurred prior to the sentence being journalized. Appellant maintains his due process rights were violated.
{Â¶15} Appellant has failed to provide this Court with a transcript of the June 16, 2014 revocation hearing.
{Â¶16} When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm. Knapp v. Edwards Lab., 61 Ohio St.2d 197, 400 N.E.2d 384 (1980).
{Â¶17} Because Appellant has failed to provide this Court with a transcript, we must presume the regularity of the proceedings below and affirm. It is the duty of the appellant to ensure the record, or whatever portions thereof are necessary for the determination of the appeal, are filed with the court in which he seeks review. Rose Chevrolet, Inc. v. Adams (1988), 36 Ohio St.3d 17, 19, 520 N.E.2d 56.
{Â¶18} We note the trial court had pronounced sentence in the case sub judice prior to the probation department filing the motion to revoke. Although the trial court may not have memorialized the sentence via judgment entry prior to the filing of the motion to vacate, Appellant clearly had been put on notice of the sentence and was given an opportunity to be heard at the June 16, 2014 revocation hearing. We find no due process violation occurred.
{Â¶19} Appellantâ€™s first assignment of error is overruled.

II

{Â¶20} In his second assignment of error, Appellant asserts the trial court erred in failing to conduct a hearing on his motion to vacate plea and amended motion to vacate plea.

{Â¶21} Crim.R. 32.1 provides that â€œ[a] motion to withdraw a plea of guilty* * * 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 a defendant to withdraw his plea.â€ A defendant who seeks to withdraw a guilty plea after sentence must establish a manifest injustice. See e.g. State v. Wilfong, 11th Dist. No.2010â€"Lâ€"074, 2011â€"Ohioâ€"6512, Â¶ 12. â€œManifest injustice is determined by examining the totality of the circumstances surrounding the guilty plea. Paramount in this determination is the trial court's compliance with Crim.R. 11(C), evidence of which must show in the record that the accused understood his rights accordingly.â€ State v. Padgett, 8th Dist. No. 64846, 1993 Ohio App. LEXIS 3374, *2, 1993 WL 243101 (Jul. 1, 1993). A trial court need not hold an evidentiary hearing on a post-sentence motion to withdraw a guilty plea unless the facts as alleged by the defendant suggest a manifest injustice would result if the plea was allowed to stand. State v. Britford, 10th Dist. No. 11APâ€"646, 2012â€"Ohioâ€"1966, Â¶ 12.

{Â¶22} Upon review of the record, we find under the circumstances of this case, the trial court did not abuse its discretion in not conducting an evidentiary hearing on Appellantâ€™s motions.

{Â¶23} Appellantâ€™s second assignment of error is overruled.

III

{Â¶24} In his third assignment of error, Appellant raises a claim of ineffective assistance of trial counsel. Specifically, Appellant contends Attorney Jonathan Morris was ineffective for advising him to plead guilty because the state would not have been able to prove he and the alleged victim were â€œfamily or household membersâ€, which was an essential element of the crime charged, as Appellant was married and living with his spouse at the time of the offense.

{Â¶25} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that trial counsel acted incompetently. See, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). In assessing such claims, â€œa court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action â€˜might be considered sound trial strategy.' " Id. at 689, citing Michel v. Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158 (1955).

{Â¶26} â€œThere are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.â€ Strickland, 466 U.S. at 689. The question is whether counsel acted â€œoutside the wide range of professionally competent assistance.â€ Id. at 690.

{Â¶27} Even if a defendant shows that counsel was incompetent, the defendant must then satisfy the second prong of the Strickland test. Under this â€œactual prejudiceâ€ prong, the defendant must show â€œthere is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.â€ Strickland, 466 U.S. at 694.

{Â¶28} Decisions which constitute trial strategy do not generally rise to the level of ineffective assistance of counsel. A reviewing court must adopt a deferential attitude to the strategic and tactical choices counsel made as part of a trial strategy. State v. Griffie, 74 Ohio St.3d 332, 333, 658 N.E.2d 764 (1996).

{Â¶29} We find counsel's advising Appellant to plead guilty was a decision made as part of a sound strategy, and is to be given deference on review. Appellant was originally placed on community control despite having two prior domestic violence convictions. This outcome was far better than the potential prison term Appellant could have received. Further, Appellant has not demonstrated, but for any presumed error on the part of trial counsel, the outcome would have been otherwise as this record does not affirmatively demonstrate the victim was not a "family or household member" as statutorily defined.

{Â¶30} The third assignment of error is overruled.

{Â¶31} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Farmer, J. and

Delaney, J. concur