[Cite as *State v. Ward*, 2015-Ohio-2064.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CHAMPAIGN COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 2014-CA-28
	:	
v.	:	Trial Court Case No. 2010-CR-017
	:	
BRIAN SCOTT WARD	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 29th day of May, 2015.

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Defendant-Appellant-Pro Se

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WELBAUM, J.

{¶ 1} In this case, Defendant-Appellant, Brian Ward, appeals from a trial court judgment overruling his post-sentence motion to withdraw his guilty plea. In support of his appeal, Ward contends that the trial court abused its discretion in denying his motion because manifest injustice was proven. Ward further contends that his defense counsel was prejudicially ineffective during the plea bargaining process and prejudicially advised him to enter into a plea agreement that was illusory, unconscionable, and contrary to law. In addition, Ward contends that his waiver of his right to trial by jury was coerced.

{¶ 2} For the reasons that follow, we conclude that the assignments of error are without merit. The trial court did not abuse its discretion in overruling Ward's motion to withdraw his guilty plea. In the first place, most of Ward's arguments are barred by res judicata. For those arguments that are not barred, Ward failed to provide the trial court with evidence supporting his allegations of ineffective assistance of counsel. Accordingly, the judgment of the trial court will be affirmed.

I. Facts and Course of Proceedings

{¶ 3} In February 2010, Ward was indicted on two counts of operating a vehicle under the influence of drugs or alcohol (OVI). Count One, a third degree felony, was based on R.C. 4511.19(A)(1)(a) and (G)(1)(e)(i). The indictment alleged that Ward had operated a vehicle under the influence of alcohol on January 9, 2010, and had previously been convicted of or had pled guilty to a violation of R.C. 4511.19(A) that was a felony. This section of Count One listed seven municipal court cases and two common pleas court cases involving Ward with dates ranging between 1979 and 2008.

{¶ 4} Count One also contained a specification under R.C. 2941.1413, which stated that within 20 years of committing the current OVI offense, Ward had been convicted of five or more equivalent offenses. This section of Count One listed two common pleas court cases and five municipal court cases with dates ranging between 1990 and 2008.

{¶ 5} Count Two of the indictment, a third degree felony, was based on R.C. 4511.19(A)(1)(h) and (G)(1)(e)(ii). The indictment alleged that while operating a vehicle on January 9, 2010, Ward had a concentration of .17 of one gram or more by weight of alcohol per 210 liters of his breath, and that he had previously been convicted or had pled guilty to a violation of R.C. 4511.19(A) that was a felony. Again, this section of Count Two listed nine prior offenses. Count Two also contained the same specification under R.C. 2941.1413, and listed seven prior offenses.

{¶ 6} A jury trial was scheduled for May 2010, but the court vacated the trial date at the request of Ward's counsel, because Ward had been hospitalized for medical issues. The court then placed the case on its inactive docket, subject to further request of counsel or court order. Subsequently, the court scheduled a status conference for January 26, 2012. The case was then set for jury trial on March 21 and 22, 2012. The transcript of the status conference indicates that Ward's counsel had already received discovery from the State. When the trial court asked if Ward would be willing to stipulate as to his prior convictions, defense counsel said that he had previously reviewed the discovery packet and would likely stipulate, but wished to review the packet again. Transcript of January 26, 2012 Status Conference, Doc. #74, p. 8. Defense counsel stated that he could probably review the packet by the following day and advise the prosecutor. *Id.*

{¶ 7} At the final pretrial hearing, the State indicated that defense counsel had contacted the State after the last hearing and would stipulate to the prior conviction for purposes of the prior conviction enhancement in the indictment and specification. Transcript of February 24, 2012 Final Pretrial Hearing, Doc. #76, p. 2. At the hearing, defense counsel said that he felt the case could be resolved with a plea, and asked the court to schedule a second pretrial. *Id.* at p. 3. The bailiff indicated that the case was third on the trial list for March 21, 2012, and the court set another final pretrial for February 29, 2012.

{¶ 8} At the February 29, 2012 pretrial, the State told the court that plea discussions had taken place the previous day, and that defense counsel had furnished the State with a wealth of medical information regarding some mitigating circumstances about Ward's conduct in the underlying offenses as well as for punishment purposes. The State indicated, however, that after the evaluation conference, the initial offer made to the defense would remain. In addition, the State's counsel told the court that he believed the parties had achieved a plea disposition in which Ward would plead guilty to Count One and the specification, which carried a mandatory confinement period. The State would ask the court to dismiss Count Two and its specification, and would agree to a presentence investigation, with the State also agreeing to review the investigation report, if ordered, prior to making any additional sentencing recommendation. Other terms of the agreement included a mandatory fine, a mandatory driver's license suspension of three years to life, mandatory participation in a drug and alcohol program, and forfeiture of the 1982 Chevrolet truck being driven at the time of Ward's arrest. February 29, 2012 Transcript of Status Conference, Doc. #77, pp. 2-3.

{¶ 9} Defense counsel agreed with the prosecutor's statements. Ward also stated that he heard and understood what the attorneys had said, and wished to plead guilty, by his own free choice. *Id*. at pp. 4-5.

{¶ 10} After the trial court went through a majority of the plea process with Ward, a discussion arose among the court and attorneys regarding the potential mandatory confinement on the specification, as well as the penalty for the underlying sentence. Both sides agreed that the potential penalty for the specification was a mandatory term of one to five years, but disagreed as to the potential term for the underlying OVI felony. The court then indicated it would continue the plea hearing to allow counsel to determine what the confinement terms were for the underlying felony and the specification. In this regard, the court stated that the statutes in question were probably among the most confusing the legislature had created. *Id.* at p. 12. At that time, the State indicated that it believed H.B. 86 had affected the potential sentence in Ward's favor. The State also indicated its belief that the OVI offense to which it was proposed that Ward plead was a "simple" OVI offense rather than the "high test" offense. *Id.* at p. 14-15.

{¶ 11} On March 20, 2012, the parties again appeared before the court. At that time, the court stated that the case was scheduled for trial the next day, but that another criminal case would take priority. As a result, Ward's trial would need to be continued if the case were going to trial, with the new trial dates being April 9 and 10, 2012. Transcript of March 20, 2012 Status Conference, Doc. #85, pp. 2 and 7-8.

{¶ 12} The State indicated that both the prosecution and defense had received the court's memorandum about the penalty section in the OVI statutes, and had discussed the next step. In addition, the State indicated that it was aware of at least two occasions

when defense counsel had met with Ward after receiving the trial court's memorandum on February 29, 2012. *Id.* at p.2. The State also told the court that Ward's counsel had attempted to get the State to dismiss the OVI specifications in Counts One and Two, but that the State was not willing to ask the court to dismiss the specification, since this was Ward's 10th OVI offense. *Id.* at p. 3. At the time, the proposed plea agreement was the same as had been discussed at the prior hearing, with the State, defense counsel, and the court all being under the impression that the underlying felony on Count One carried a 60-day minimum mandatory sentence, while Count Two carried a minimum mandatory sentence of 120 days. *Id.* at pp. 11 and 20. The court further noted that due to the delay in the case, the potential maximum penalty on the underlying felony charge had been reduced from five years to three years. *Id.* at 20.

{¶ 13} During the status conference, the court also discussed a letter that Ward had sent concerning his apparent dissatisfaction with his current attorney. *Id.* at p. 8. The court noted Ward's allegation that his attorney had been deceptive, that the case could have been completed earlier, and that the attorney had some interest in the "worst outcome." The court indicated that Ward's attorney was highly qualified, and there was no evidence that the attorney did not have Ward's best interest at heart. The court, therefore concluded that Ward failed to establish a basis for appointment of different counsel. *Id.* at pp. 8-9.

{¶ 14} Ward's attorney also stated that when Ward told him about the letter he had sent to the court, Ward had expressed a loss of confidence in the attorney, based on the confusion over the penalties at the first plea hearing. Transcript of March 20, 2012 Status Conference, Doc. #85, p. 18. In response, the trial court stressed at the March

20, 2012 status conference that this area of the law was very confusing to all, and that due to the delay in proceedings, Ward had received the benefit of a lower potential penalty for the underlying felony. *Id.* at pp. 18-19. During the hearing, the court also rejected Ward's contention about speedy trial deadlines, noting that any reason the court was beyond the deadline was because the defense had requested delays based on Ward's medical condition. *Id*.

{¶ 15} After hearing from Ward and discussing again the potential of one to five years in prison on the specification and a maximum of three years on the underlying charge, with a total exposure of eight years in prison, the trial court continued the hearing until later that day so that Ward could discuss the plea with his counsel. *Id.* at pp. 16 and 18-24.

{¶ 16} When the hearing was reconvened, the parties had agreed to resolve the case on the terms previously outlined, i.e., Ward's plea to Count One and the specification, dismissal of Count Two and the specification, mandatory imprisonment of a minimum of one year on the specification to a maximum of five years; a potential sentence of 9 to 36 months on the underlying OVI felony, and the remaining mandatory terms such as license suspension, forfeiture of Ward's truck, and so forth. At that point, the trial court asked Ward if he understood what had been said, and Ward indicated that he did understand. Ward also said that he understood what he was doing, that he was making the decision of his own free choice, and that he wanted the court to accept his guilty plea. Transcript of March 20, 2012 Plea Hearing, Doc. #86, pp. 28-29.

{¶ 17} The trial court then conducted a Crim.R. 11(C) discussion, including ascertaining that Ward understood, among other things, that if he pled guilty, he would

give up the right to a jury trial. *Id.* at p. 43. Ward stated that he understood this, as well as the fact that if he pled guilty, he would give up his right to challenge the court's speedy trial decision. *Id*. at pp. 44-45. The trial court also thoroughly reviewed the possible potential sentences, post-release control, and the plea form. *Id*. at pp. 46-55. After concluding that Ward understood his rights and the potential consequences, the court accepted Ward's guilty plea and set a sentencing hearing for May 7, 2012. *Id*. at pp. 55-56.

{¶ 18} Subsequently, Ward filed a motion to vacate the sentencing hearing, based on medical issues and appointments. The trial court then continued the hearing until May 11, 2012. At the sentencing hearing, the State noted that it had reviewed the presentence investigation report and had also performed a criminal history investigation check, due to the delay in the case. As a result, and also based on information provided by Ward's counsel, the State had learned that after the incident at issue in the current case, Ward was charged with driving under suspension, and had been convicted of that charge in November 2011.

{¶ 19} The State again reiterated that it would not ask the court to dismiss the specification to Count One because of Ward's many prior OVI offenses. However, the State took no position as to a specific sentencing recommendation. After hearing from Ward and his counsel, the trial court sentenced Ward to 18 months on the underlying OVI felony; five years for the specification, which was mandatory and was to be served prior to and consecutive with the OVI sentence (for a total six and a half year sentence); a ten-year driver's license suspension; a $1,350 mandatory fine; mandatory drug and alcohol treatment; forfeiture of Ward's truck; and three years of post-release control.

{¶ 20} The sentencing entry was filed on May 15, 2012. Ward did not appeal from the final judgment. However, on December 18, 2013, Ward filed a pro se post-sentence motion seeking to withdraw his guilty plea. After some delay in obtaining transcripts for Ward, the trial court overruled the motion to withdraw the plea on August 7, 2014. This pro se appeal then followed.

II. Manifest Injustice

{¶ 21} Ward's First Assignment of Error states that:

> The Trial Court Erred and Abused Judicial Discretion to Deny the Post-Sentence Motion to Withdraw the Guilty Plea under the Res Judicata Standard Set Forth in Ohio's Post-Conviction Statutes When a Manifest Injustice Was Proven.

{¶ 22} Under this assignment of error, Ward contends that the trial court erred by applying the principles of res judicata set forth in R.C. 2953.21 and 2953.23 rather than the manifest injustice standard that applies to post-sentence motions to withdraw guilty pleas.

{¶ 23} 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.

{¶ 24} Ward's motion to withdraw his guilty plea was based on the following points: (1) ineffective assistance of counsel in failing to challenge the indictment on double

jeopardy grounds, and therefore allowing the State to use a duplicate charge to coerce Ward into pleading guilty; and (2) ineffective assistance of counsel in pressuring Ward into pleading guilty when Ward did not understand the nature of the offense to which he was pleading guilty or the consequences. Ward did not file any affidavits with his motion that raised facts outside the record.

{¶ 25} We have previously stressed that "[t]he distinction between presentence and post-sentence motions to withdraw pleas of guilty or no contest indulges a presumption that post-sentence motions may be motivated by a desire to obtain relief from a sentence the movant believes is unduly harsh and was unexpected. The presumption is nevertheless rebuttable by showing of a manifest injustice affecting the plea." *State v. Brooks*, 2d Dist. Montgomery No. 23385, 2010-Ohio-1682, ¶ 8. " 'A "manifest injustice" comprehends a fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the resulting prejudice through another form of application reasonably available to him or her.' " *Id.*, quoting *State v. Hartzell*, 2d Dist. Montgomery No. 17499, 1999 WL 957746, *2 (Aug. 20, 1999). The moving party has the burden of demonstrating manifest injustice. *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus.

{¶ 26} A motion to withdraw "is addressed to the sound discretion of the trial court * * *." *Smith* at paragraph two of the syllabus. As a result, we will not reverse the trial court unless it has abused its discretion. *State v. Turner*, 171 Ohio App.3d 82, 2007-Ohio-1346, 869 N.E.2d 708, ¶ 21 (2d Dist.). An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable." (Citations omitted.) *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶ 27} Contrary to Ward's argument, res judicata is not limited to post-conviction petitions. Instead, we have also applied res judicata in ruling on post-sentence requests to withdraw guilty pleas. *See, e.g.*, *State v. Curtis*, 2d Dist. Greene No. 2011-CA-56, 2013-Ohio-1690, ¶ 11, citing *State v. Ulery*, 2d Dist. Clark No. 2010 CA 89, 2011-Ohio-4549. ¶ 10. In this regard, the Supreme Court of Ohio has held that:

> Res judicata bars the assertion of claims against a valid, final judgment of conviction that have been raised or could have been raised on appeal. *State v. Perry* (1967), 10 Ohio St.2d 175, 39 O.O.2d 189, 226 N.E.2d 104, paragraph nine of the syllabus. Ohio courts of appeals have applied res judicata to bar the assertion of claims in a motion to withdraw a guilty plea that were or could have been raised at trial or on appeal. *See State v. McGee*, 8th Dist. No. 91638, 2009-Ohio-3374, ¶ 9; *State v. Totten*, 10th App. No. 05AP-278 and 05AP-508, 2005-Ohio-6210, ¶ 7 (collecting cases).

State v. Ketterer, 126 Ohio St.3d 448, 459, 2010-Ohio-3831, 935 N.E.2d 9, ¶ 59. Thus, the trial court did not err to the extent that it relied on res judicata in connection with Ward's motion to withdraw his guilty plea.

{¶ 28} " 'Under the doctrine of res judicata, "[a] point or a fact which was actually and directly in issue in a former action and was there passed upon and determined by a court of competent jurisdiction may not be drawn in question in any future action between the same parties or their privies, whether the cause of action in the two actions be identical or different." ' " *Curtis* at ¶ 11, quoting *Ulery* at ¶ 10, which in turn quotes *Norwood v. McDonald*, 142 Ohio St. 299, 52 N.E.2d 67 (1943), paragraph three of the syllabus.

{¶ 29} Most of the points that were raised in Ward's motion to withdraw his plea are matters that could have been raised on direct appeal. As was noted, Ward's first argument was that his trial counsel acted ineffectively by failing to file a motion to dismiss the indictment on double jeopardy grounds. However, this is an argument that is based on matters evident in the record and could have been raised on direct appeal.

{¶ 30} Ward's other argument supporting his motion to withdraw the plea was that counsel pressured him into pleading guilty when he (Ward) did not understand the nature of the offenses or the consequences. However, this again, is a matter that could have been raised on direct appeal. Furthermore, the record belies Ward's claims, as Ward told the trial court during the plea hearing that he understood the charges and penalties, that he wanted to plead guilty of his own, free choice, and that no promises or threats had been made to him.

{¶ 31} Ward contends, however, that res judicata should not be applied against him, because he never appealed his conviction. We reject this contention, because we have previously held that a defendant who fails to directly appeal his conviction is precluded by res judicata from raising arguments in a post-sentence motion to withdraw that could have been raised in a direct appeal. *State v. Ross*, 2d Dist. Miami No. 2013 CA 1, 2013-Ohio-2766, ¶ 10.

{¶ 32} On the other hand, we have held that "[a] claim of ineffective assistance of counsel could not have been asserted before if it relies on matters outside the record." *Curtis*, 2d Dist. Greene No. 2011-CA-56, 2013-Ohio-1690, at ¶ 12, citing *State v. Hennis*, 165 Ohio App.3d 66, 2006-Ohio-41, 844 N.E.2d 907, ¶ 20 (2d Dist.). Thus, Ward's claim would not be precluded to the extent that his claim of "pressure" from his counsel to plead

guilty could be construed as raising matters that are not of record. However, this bare allegation, without any evidentiary support, is insufficient. We noted in *Curtis* that:

> "Ineffective assistance of counsel is a manifest injustice." (Citations omitted.) *State v. Moore*, 4th Dist. Pike No. 01 CA674, 2002-Ohio-5748, ¶ 19. But it is grounds for withdrawing a guilty plea "only to the extent that counsel's ineffectiveness makes the plea less than knowing and voluntary." (Citation omitted.) *State v. Milbrandt*, 2d Dist. Champaign No. 2007-CA-3, 2008-Ohio-761, ¶ 9.

Curtis at ¶ 14.

{¶ 33} In this regard, "[a] defendant must show a strong probability that but for trial counsel's deficient performance, the defendant would not have pled guilty." (Citation omitted.) *Milbrandt* at ¶ 9. We stressed in *Milbrandt* that "[c]ompliance with Crim.R. 11(C) creates a presumption that a defendant's waiver of his constitutional rights is knowing, intelligent, and voluntary." *Id.* at ¶ 15.

{¶ 34} The trial court complied with the requirements of Crim.R. 11(C), and Ward failed to rebut the presumption that his plea was knowing, intelligent, and voluntary. In this regard, the trial court held that the motion to withdraw should be denied because Ward's "self-serving allegations" were not supported by the record. We agree.

{¶ 35} In *State v. Anderson*, 2d Dist. Montgomery No. 17040, 1998 WL 801307 (Nov. 20, 1998), we held that the defendant "was required to submit something more than his own, self-serving affidavit to obtain the right to an evidentiary hearing upon his motion" to withdraw his guilty plea. *Id*. at *2. The defendant in *Anderson*, like Ward, claimed that he had been pressured to plead guilty. *Id.* at *1. However, the defendant's

allegations were not supported by the record, nor did the defendant submit other supporting evidence. *Id.* As a result, we affirmed the denial of his motion to withdraw his guilty plea. *Id.*[1]

{¶ 36} As was noted above, Ward repeated several times on the record that his plea was of his own free choice – which contradicts his assertion, now, that he was pressured. In the absence of any other evidence, Ward's bare assertion is insufficient to show that his counsel acted ineffectively by allegedly pressuring Ward to plead guilty. *See, e.g., State v. McMichael*, 10th Dist. Franklin Nos. 11AP-1042, 11AP-1043, 11AP-1044, 2012-Ohio-3166. In *McMichael*, the court stressed that:

> A defendant's representations to the trial court regarding his plea deserve significant weight when defendant files a motion to withdraw his or her plea. *Westlake v. Barringer*, 8th Dist. No. 73774 (Dec. 24, 1998) (noting a "defendant cannot succeed on a motion to withdraw a plea based on erroneous advice when defendant states that no promises were made in exchange for the plea and when the possibility of jail is explained"); *State v. Lewis*, 4th Dist. No. 08CA10, 2008-Ohio-4888, ¶ 2 (observing the record contradicted a defendant's assertion that his attorneys coerced him into pleading guilty where he told the court at the sentencing hearing he understood the consequences of pleading guilty and his pleas were voluntary).

Id. at ¶ 26.

{¶ 37} Accordingly, the First Assignment of Error is overruled.

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[1] In contrast to the case before us, the defendant in *Anderson* at least submitted an affidavit. Here, Ward only made unverified statements in his motion.

III. Alleged Deficient Representation During the Plea Bargaining Process

{¶ 38} Ward's Second Assignment of Error states that:

> The Trial Court Erred and Abused Judicial Discretion When Denying the Post-Sentence Motion to Withdraw Guilty Plea When Proven that Defense Counsel was Prejudicially Ineffective During the Plea Bargaining Process, Tantamount to a Manifest Injustice.

{¶ 39} Under this assignment of error, Ward contends that his trial counsel functioned ineffectively during the plea bargaining process by failing to tell him that the offenses with which he was charged were allied offenses of similar import. According to Ward, the consideration for his guilty plea was the reduction of the 120-day consecutive sentence of local incarceration imposed under Count Two pursuant to R.C. 4511.19(A)(1)(h), R.C. 4511.19(G)(1)(e)(ii), and R.C. 2929.13(G)(2), in contrast with the lesser 60-day consecutive sentence of local incarceration imposed under Count One pursuant to R.C. 4511.19(A)(1)(a) and R.C. 4511.19(G)(1)(e)(i), and R.C. 2929.13(G)(2). Ward argues that neither the 60-day nor the 120-day sentence could have been imposed based on our decision in *State v. Kennedy*, 2d Dist. Champaign No. 2011-CA-3, 2011-Ohio-4291. In addition, Ward contends that if counsel had advised him of the allied offenses issue, he would never have pled guilty and would have demanded a jury trial or a better offer from the State.

{¶ 40} In responding to this assignment of error, the State first notes that the record contains no credible evidence of what the testimony would have been at trial. The State also argues that there is no assurance that a jury might not have found from the

testimony a basis for a guilty verdict on both charges from witnesses having observed two separate incidents on the same day.

{¶ 41} The record is devoid of specific evidence regarding the events that gave rise to the indictment. At the plea hearing, the prosecutor was asked by the court if he had information to uphold a finding of guilt, and he said that he did. Transcript of March 20, 2012 Plea Hearing, Doc. #86, p. 46. Subsequently, during the court's questioning, Ward admitted that he had operated a vehicle while under the influence of alcohol. *Id.* at p. 50. The only other information in the record is Ward's unverified statement in his motion to withdraw that he still did not understand why he was charged with two OVI offenses stemming from one incident. Post-Sentence Motion to Withdraw Guilty Plea, Doc. #67, p. 2.

{¶ 42} We have previously indicated in the context of a petition for post-conviction relief that a " 'a petition for post-conviction relief is subject to dismissal without a hearing when the record, including the dialogue conducted between the court and the defendant pursuant to Crim.R. 11, indicates that the petitioner is not entitled to relief and that the petitioner failed to submit evidentiary documents containing sufficient operative facts to demonstrate that the guilty plea was coerced or induced by false promises.' " *State v. Boyd*, 2d Dist. Montgomery No. 18873, 2002 WL 360333, *2 (March 8, 2002), quoting *State v. Kapper*, 5 Ohio St.3d 36, 38, 448 N.E.2d 823 (1983). For the same reasons, we also rejected the defendant's attempt in *Boyd* to vacate his guilty plea. *Id.* at *7. Specifically, we stated in this regard that:

> Here, Boyd alleges that his plea was not made knowingly and voluntarily because of [his attorney's] deficient performance. Based on our previous

> discussion, we agree with the trial court that the record does not support Boyd's claims. Cf*. State v. Davidson* (Aug. 5, 1996), Cuyahoga App. No. 69380, unreported (refusing to reverse trial court's denial of defendant's motion to dismiss in spite of defendant's claim that the court failed to advise defendant about the discretionary imposition of actual incarceration). As we previously explained, [Boyd's] two affidavits and two unsworn statements are insufficient to overcome the presumption that Boyd's plea was voluntary. *Kapper*, supra. Thus, this claim fails.

Id.

{¶ 43} In the case before us, Ward failed to submit any evidence to support any of his allegations. For this reason alone, the trial court did not err in denying the motion to withdraw the plea.

{¶ 44} Assuming for the sake of argument that the two charges resulted from a single incident, there is nothing unusual about the fact that an indictment may allege multiple or allied offenses. Furthermore, there are many reasons why a defendant may choose to plead guilty, besides the dismissal of a charge.

{¶ 45} Count One of Ward's indictment was based on R.C. 4511.19(A)(1)(a), which prohibits operation of a vehicle while "[t]he person is under the influence of alcohol, a drug of abuse, or a combination of them." At the time of the plea bargain, the remaining part of the statute referenced in Count One, R.C. 4511.19(G)(1)(e)(i), provided, in pertinent part, that:

> (G)(1) Whoever violates any provision of divisions (A)(1)(a) to (i) or (A)(2) of this section is guilty of operating a vehicle under the influence of

alcohol, a drug of abuse, or a combination of them. * * * The court shall sentence the offender for either offense under Chapter 2929. of the Revised Code, except as otherwise authorized or required by divisions (G)(1)(a) to (e) of this section:

* * *

(e) An offender who previously has been convicted of or pleaded guilty to a violation of division (A) of this section that was a felony, regardless of when the violation and the conviction or guilty plea occurred, is guilty of a felony of the third degree. The court shall sentence the offender to all of the following:

(i) If the offender is being sentenced for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 of the Revised Code or a mandatory prison term of sixty consecutive days in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender is not convicted of and does not plead guilty to a specification of that type. The court may impose a prison term in addition to the mandatory prison term. The cumulative total of a sixty-day mandatory prison term and the additional prison term for the offense shall not exceed five years.[2]

[2] R.C. 4511.19 has since been amended, but our research indicates that no relevant parts

{¶ 46} Count Two of the indictment was based on R.C. 4511.19(A)(1)(h), which prohibits operation of a vehicle when "[t]he person has a concentration of seventeen-hundredths of one gram or more by weight of alcohol per two hundred ten liters of the person's breath." At the time of the plea bargain, the remaining part of the statute referenced in Count One, R.C. 4511.19(G)(1)(e)(ii), provided, in pertinent part, that:

> (G)(1) Whoever violates any provision of divisions (A)(1)(a) to (i) or (A)(2) of this section is guilty of operating a vehicle under the influence of alcohol, a drug of abuse, or a combination of them. * * * The court shall sentence the offender for either offense under Chapter 2929. of the Revised Code, except as otherwise authorized or required by divisions (G)(1)(a) to (e) of this section:
>
> * * *
>
> (e) An offender who previously has been convicted of or pleaded guilty to a violation of division (A) of this section that was a felony, regardless of when the violation and the conviction or guilty plea occurred, is guilty of a felony of the third degree. The court shall sentence the offender to all of the following:
>
> * * *
>
> (ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance

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of the statute have been changed.

> with division (G)(2) of section 2929.13 of the Revised Code if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 of the Revised Code or a mandatory prison term of one hundred twenty consecutive days in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender is not convicted of and does not plead guilty to a specification of that type. The court may impose a prison term in addition to the mandatory prison term. The cumulative total of a one hundred twenty-day mandatory prison term and the additional prison term for the offense shall not exceed five years.

{¶ 47} At the time of the plea bargain, R.C. 2929.13(G)(2) also provided, in pertinent part, as follows:

> If the offender is being sentenced for a third degree felony OVI offense, * * * the court shall impose upon the offender a mandatory prison term of one, two, three, four, or five years if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 of the Revised Code or shall impose upon the offender a mandatory prison term of sixty days or one hundred twenty days as specified in division (G)(1)(d) or (e) of section 4511.19 of the Revised Code if the offender has not been convicted of and has not pleaded guilty to a specification of that type. * * * The offender shall serve the one-, two-, three-, four-, or five-year mandatory prison term consecutively to and prior to the prison term imposed for the underlying offense and consecutively to any other mandatory prison term imposed in relation to the offense.

{¶ 48} Thus, under these statutes, the trial court would have been required to sentence Ward to a mandatory term of one to five years for the R.C. 2941.1413 specification. Only in situations where no specification applied would the court have been able to impose a 60-day mandatory consecutive sentence under R.C. 4511.19(A)(1)(e)(i), or a 120-day mandatory consecutive sentence under R.C. 4519.19(A)(1)(e)(ii). By using the term "or," the legislature indicated that the trial court was to choose between the options.

{¶ 49} In *Kennedy*, we agreed with the State that the last-quoted sentence above, in R.C. 2929.13(G)(2), "introduces some confusion by adding the words 'consecutively to any other mandatory prison term imposed in relation to the offense.' " *Kennedy*, 2d Dist. Champaign No. 2011-CA-3, 2011-Ohio-4291, at ¶ 45. We noted that there was no indication what the legislature intended by this language. *Id*. We also reviewed the legislative analysis that accompanied the change when the legislature re-wrote R.C. 2929.13(G) in 2004. *Id*. at ¶ 46-49. Although we found no specific comments about the meaning of the change in language, we noted that the legislative analysis did "support the conclusion that the 60-day mandatory term does not apply where a specification exists." *Id.* at ¶ 48. Ultimately, we concluded that:

> To the extent that R.C. 2929.23(G)(2) [sic] creates any ambiguity, we will not construe it to increase the penalty, particularly since R.C. 4511.19(G)(1)(d)(i) clearly indicates that the 60-day mandatory sentence applies only to situations that do not involve R.C. 2941.1413 specifications. *See, e.g., State v. Elmore*, 122 Ohio St.3d 472, 481, 2009-Ohio-3478, ¶ 38 (noting that "[t]he rule of lenity is a principle of statutory construction that

> provides that a court will not interpret a criminal statute so as to increase the penalty it imposes on a defendant if the intended scope of the statute is ambiguous"), and *State v. Young* (1980), 62 Ohio St.2d 370, 374 (holding that ambiguities in criminal statutes are resolved in favor of defendants). *Accord State v. Carter*, Champaign App. No. 2005-CA-24, 2006-Ohio-984, ¶ 18, citing R.C. 2901.04(A).

Kennedy at ¶ 50.

{¶ 50} Under these statutes, then, Ward could have been sentenced from one to five years if he were convicted of or pled guilty to a specification of the type described in R.C. 2929.1413. In the alternative, if Ward were not convicted of or did not plead guilty to such a specification, he could have received a 60-day mandatory sentence under R.C. 4511.19(G)(1)(e)(i), or a 120-day mandatory sentence under R.C. 4511.19(G)(1)(e)(ii). Under these statutes and R.C. 2929.14(B), Ward could also have been sentenced to an additional prison term of nine to 36 months on the underlying third-degree felony charge, in the trial court's discretion. *See, e.g., State v. May*, 2d Dist. Montgomery No. 25359, 2014-Ohio-1542, ¶ 27-29.

{¶ 51} *Kennedy* was decided after Ward's plea occurred, involved the same trial court, and involved R.C. 4511.19(G)(1)(d), which is similar to R.C. 4511.19(G)(1)(e). In *Kennedy*, the trial court had imposed three years on the R.C. 2941.1413 specification and twelve months on the underlying OVI charge, with 60 days of the twelve months to be mandatory. *Kennedy* at ¶ 10. We noted that the trial court and the parties, including the prosecutor, "were all mistaken about imposition of the mandatory 60-day sentence under R.C. 4511.19(G)(1)(d)." *Id*. at ¶ 6. Although we concluded that the trial court had erred

in imposing the 60-day mandatory sentence, we also concluded that Kennedy's trial counsel did not render ineffective assistance of counsel. *Id.* at ¶ 6 and 90-94.

{¶ 52} "In order to prevail on a claim of ineffective assistance of counsel, the defendant must show both deficient performance and resulting prejudice. * * * Trial counsel is entitled to a strong presumption that his conduct falls within the wide range of effective assistance, and to show deficiency, the defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness." *State v. Matthews*, 189 Ohio App.3d 446, 2010-Ohio-4153, 938 N.E.2d 1099, ¶ 39 (2d Dist.), citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶ 53} In the case before us, Ward was clearly told that the minimum mandatory penalty would be one year in prison, and the maximum potential sentence would be eight years. Transcript of March 20, 2012 Status Conference, Doc. #85, pp. 16 and 22; Transcript of March 20, 2012 Plea Hearing, Doc. #86, pp. 28 and 40. Although the trial court incorrectly stated at the status conference that any mandatory 60-day sentence would be included in the other penalties, that error would basically have been irrelevant, because Ward knew that he would be serving at least one year in prison, and a maximum of eight years. Doc. #85 at p. 22. These were the relevant facts for purposes of his potential incarceration, and Ward has not submitted any evidence indicating otherwise. We also note that any alleged error in sentencing could have been raised on direct appeal, as it was in *Kennedy*.

{¶ 54} In view of Ward's failure to provide evidence to support his claim of ineffective assistance of counsel, the Second Assignment of Error is overruled.

IV. Ineffective Assistance Regarding Plea Contract

{¶ 55} Ward's Third Assignment of Error states that:

> The Trial Court Erred and Abused Judicial Discretion to Deny the Post-Sentence Motion to Withdraw the Guilty Plea When Proven that Defense Counsel Was Prejudicially Ineffective to Advise His Client to Enter into an Illusory and Unconscionable Plea Contract, Tantamount to a Manifest Injustice.

{¶ 56} Under this assignment of error, Ward contends that trial counsel was prejudicially ineffective by withholding the amount of time the prosecution wanted him to serve, while leading him to believe that a sentencing recommendation from the State was forthcoming after the pre-sentence investigation. According to Ward, this left him in the position of a "sitting duck" concerning whatever sentence the trial court felt appropriate to impose, and rendered the plea contract illusory and unconscionable.

{¶ 57} As Ward points out, "[t]here is some basis to support [the] argument that a criminal defendant may raise an ineffective assistance of counsel claim based on counsel's failure to follow or enforce the terms of a plea agreement." *State v. Dickinson*, 7th Dist. Columbiana No. 03 CO 52, 2004-Ohio-6373, ¶ 14, citing *State v. Aponte*, 145 Ohio App.3d 607, 763 N.E.2d 1205 (10th Dist.2001). However, Ward again failed to provide the trial court with evidence to support his assertions in this regard.

{¶ 58} As an initial point, we note that the State fully complied with the plea bargain. The State did review the presentence investigation, as promised, but elected at the sentencing hearing not to make a specific recommendation, in part, because there was a mandatory prison term. Transcript of May 11, 2012 Status Conference

(Sentencing Hearing), Doc. #75, p. 5. Notably, the State had not at any time committed to make a specific sentencing recommendation, Instead, the plea agreement merely provided that the State would review the pre-sentence investigation, if ordered, prior to making any additional sentencing recommendation. Plea of Guilty Agreement and Entry, Doc. #42, p. 3.

{¶ 59} More importantly, the trial court informed Ward on more than one occasion that regardless of any suggestions or recommendations of the attorneys, the court was not required to follow their recommendations, and would make its own decisions. Ward acknowledged that he understood this. *See* February 29, 2012 Transcript of Status Conference, Doc. #77, pp. 6-7; Transcript of March 20, 2012 Plea Hearing, Doc. #86, pp. 35-36.

{¶ 60} Accordingly, the record contradicts Ward's claim that he would not have pled guilty if he knew that the State would not suggest a numerical sentence recommendation. "A hearing on a motion to withdraw a guilty plea 'is not required where the record, on its face, conclusively and irrefutably contradicts the allegations in support of the withdrawal' motion." *State v. Carter*, 2d Dist. Montgomery No. 23987, 2011-Ohio-3613, ¶ 10, quoting *State v. Legree*, 61 Ohio App.3d. 568, 574, 573 N.E.2d 687 (6th Dist. 1988).

{¶ 61} Based on the preceding discussion, the Third Assignment of Error is overruled.

V. Waiver of Jury Trial

{¶ 62} Ward's Fourth Assignment of Error states that:

The Trial Court Erred and Abused Judicial Discretion to Deny the Post-Sentence Motion to Withdraw Guilty Plea When the Trial Court Secured the Waiver of the Right to Trial by Jury by Classifying It as a Threat Rather than a Right, Tantamount to a Manifest Injustice.

{¶ 63} Under this assignment of error, Ward contends that the trial court abused its discretion in denying his motion to withdraw because he did not knowingly, voluntarily, and intelligently waive his right to trial by jury. This argument is based on Ward's claim that the trial court classified the right to jury trial as a "threat."

{¶ 64} As a preliminary matter, we note that Ward failed to raise this issue in the trial court. See Post-Sentence Motion to Withdraw Plea, Doc. #67, and Motion for Leave to Supplement the Pleadings, Doc. #79. "It is axiomatic that a defendant cannot raise new grounds for withdrawing his pleas for the first time on appeal." *State v. Pierce*, 2d Dist. Montgomery No. 22440, 2008-Ohio-4930, ¶ 25.

{¶ 65} However, even if the matter had been raised below, the trial court fully complied with Crim.R. 11(C), including advising Ward of his right to jury trial and obtaining his waiver of the right. Transcript of March 20, 2012 Plea Hearing, Doc. #86, pp. 43. Later in the hearing, the following exchange occurred:

THE COURT: Has anybody made any threat against you to get you to plead guilty except the threat of having to go to trial; that threat of having to go to trial included a decision having been made either today or tomorrow, otherwise, the prosecutor will not be involved in any plea disposition? Has there been any threat other than that process?

DEFENDANT WARD: No, sir.

THE COURT: Has there been any promises to get you to plead other than the promises you heard the prosecutor mention here today?

DEFENDANT WARD: No, sir.

Id. at pp. 45-56.

{¶ 66} During this exchange, the trial court did not improperly classify Ward's right to jury trial as a "threat." The court simply indicated that, per the State's prior discussion on the record, the case would proceed to jury trial about three weeks later, if the State's offer were not accepted.

{¶ 67} Accordingly, the Fourth Assignment of Error is overruled.

VI. Whether the Sentence Was Contrary to Law

{¶ 68} Ward's Fifth Assignment of Error states that:

The Trial Court Erred and Abused Judicial Discretion to Deny the Post-Sentence Motion to Withdraw Guilty Plea When Counsel Prejudicially Advised His Client to Enter into a Guilty Plea Contract to a Sentence That Was Contrary to Law, Tantamount to a Manifest Injustice.

{¶ 69} Under this assignment of error, Ward contends that defense counsel was prejudicially ineffective by persuading him to enter into a plea that involved 60 mandatory days of local incarceration that is contrary to R.C. 4511.19(A)(1)(a), R.C. 4511.19(G)(1)(e)(i), and R.C. 2929.13(G)(2), as well as our decision in *Kennedy*, 2d Dist. Champaign No. 2011-CA-3, 2011-Ohio-4291. This is an issue that could have been raised on direct appeal, and, therefore, consideration of it is barred in this proceeding by res judicata. *Curtis*, 2d Dist. Greene No. 2011-CA-56, 2013-Ohio-1690, at ¶ 11.

{¶ 70} Based on the preceding discussion, the Fifth Assignment of Error is overruled.

VII. Conclusion

{¶ 71} All of Ward's assignments of error having been overruled, the judgment of the trial court is affirmed.

. . . . . .

FROELICH, P.J. and HALL, J., concur.

Copies mailed to:

Jane A. Napier
Brian Scott Ward
Hon. David C. Faulkner – Sitting by Assignment