

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

STATE OF OHIO

Plaintiff-Appellee

V.

DAYRON J. McCOMB

Defendant-Appellant

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C.A. CASE NO. 2015-CA-17

T.C. NO. 14CR284

(Criminal appeal from
Common Pleas Court)

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OPINION

Rendered on the 19th day of February, 2016.

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Attorney for Plaintiff-Appellee

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Attorney for Defendant-Appellant

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DONOVAN, P.J.

{¶ 1} Defendant-appellant Dayron J. McComb appeals his conviction and sentence for one count of possession of heroin, in violation of R.C. 2925.11(A)(C)(6)(c), a felony of the third degree. McComb filed a timely notice of appeal with this Court on

May 6, 2015.

{¶ 2} The incident which forms the basis for the instant appeal occurred on October 20, 2014, when McComb was incarcerated in the Tri-County Jail in Mechanicsburg, Ohio, on a charge of failure to comply with the order or signal of a police officer committed in Madison County, Ohio, in Case No. CR-20140185. While he was incarcerated, McComb was discovered by authorities to be in possession of heroin that he was attempting to sell to another inmate.

{¶ 3} Thereafter, on December 11, 2014, McComb was indicted for one count of trafficking in heroin, one count of possession of heroin, and one count of possession of criminal tools. At his arraignment on February 17, 2015, McComb waived the reading of the indictment and pled not guilty to the charges in the indictment. On March 26, 2015, McComb's appointed counsel was removed from the case because he retained new counsel.

{¶ 4} On April 1, 2015, McComb pled guilty to one count of possession of heroin. In exchange for his guilty plea, the State agreed to recommend a prison term of eighteen months. The State also agreed to dismiss the remaining two counts in the indictment. The trial court accepted McComb's plea and found him guilty of possession of heroin. At the time that he pled guilty in the instant case, McComb was serving a twenty-four month sentence in Madison County for the failure to comply with the order or signal of a police officer charge.

{¶ 5} At McComb's sentencing hearing on April 7, 2015, the trial court informed the parties that if a prison term was to be imposed, the prison term would have to be served consecutively to the sentence imposed in Madison County for failure to comply in

separate Case No. CR-20140185. See R.C. 2921.331(D)¹. Because McComb had not been informed regarding the mandatory consecutive sentences at the time he tendered his guilty plea, the trial court offered McComb the opportunity to withdraw his plea, or in the alternative, redo the plea and proceed directly to sentencing. After consulting with his counsel, McComb indicated that he wanted to proceed with his guilty plea, necessitating a new plea colloquy, knowing the sentence must be consecutive to the sentence already imposed in the failure to comply case.

{¶ 6} In a new colloquy, the trial court informed McComb that any prison time in the instant case would have to be served consecutively to the sentence he was serving in Case No. CR-20140185. At the end of the colloquy, McComb pled guilty once again. The trial court accepted McComb's guilty plea and sentenced him to thirty-six months in prison for possession of heroin. The trial court also suspended McComb's driver's license for six months, and ordered him to pay a mandatory fine of \$5,000.00 Pursuant to R.C. 2921.331(D), the trial court ordered McComb's sentence in the instant case to be served consecutively to the sentence he was serving in Case No. CR-20140185 for failure to comply.

{¶ 7} It is from this judgment that McComb now appeals.

{¶ 8} McComb's sole assignment of error is as follows:

¹ R.C. 2921.331(D) states as follows: "If an offender is sentenced pursuant to division (C)(4) or (5) of this section for a violation of division (B) of this section, and if the offender is sentenced to a prison term for that violation, the offender *shall serve the prison term consecutively to any other prison term or mandatory prison term imposed upon the offender.*" Similarly, R.C. 2929.14(C)(3) states that "[i]f a prison term is imposed for *** a felony violation of division (B) of section 2921.331 of the Revised Code, *the offender shall serve that prison term consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.*"

{¶ 9} “MR. MCCOMB WAS NEVER FULLY INFORMED THAT ANY PRISON SENTENCE HE MIGHT RECEIVE WOULD ONLY RUN CONSECUTIVELY TO HIS SENTENCE FROM MADISON COUNTY AND BECAUSE OF THIS ERROR MR. MCCOMB RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.”

{¶ 10} In his sole assignment, McComb contends that he received ineffective assistance because his counsel never fully explained to him that any prison sentence he received in the instant case would have to be served consecutively to the sentence he was serving for his conviction in Madison County. Because of the alleged ineffective assistance of counsel he received, McComb argues that his guilty plea was not made in a knowing, voluntary, and intelligent fashion.

{¶ 11} “We review the alleged instances of ineffective assistance of trial counsel under the two prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and adopted by the Supreme Court of Ohio in *State v. Bradley* (1989), 42 Ohio St.3d 136, * * *. Pursuant to those cases, trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Strickland*, 466 U.S. at 688 [104 S.Ct. 2052]. To reverse a conviction based on ineffective assistance of counsel, it must be demonstrated that trial counsel's conduct fell below an objective standard of reasonableness and that his errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *Id.* Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel.” (Internal citation omitted). *State v. Mitchell*, 2d Dist.

Montgomery No. 21957, 2008-Ohio-493, ¶ 31.

{¶ 12} It is undisputed that at his original plea hearing on April 1, 2015, McComb was not informed by his attorney, the State, nor the trial court that if a prison term was imposed, the prison term would have to be served consecutively to the sentence imposed in Madison County for failure to comply in separate Case No. CR-20140185. However, at McComb's sentencing hearing on April 7, 2015, the following exchange occurred:

The Court: *** In reviewing the State's sentencing memorandum yesterday, the Court has a concern that it believes that we need to address before we get to the sentencing portion of the hearing. And that is that the State accurately presented *that if a prison term is imposed in this case, state law requires it to be consecutive to the Defendant's current term of imprisonment that he is serving in Madison County.*

In the plea form that was executed on April 1 and that was filed on April 2, on the second page, it says that the sentence in this may be consecutive to any other pending felony charge. *And the Court believes that that is an error in fact and in law. And the Court believes that because the Defendant was advised that consecutive sentencing was a potential so, in other words, discretionary as opposed to mandatory, the Court believes that the plea that was entered on April 1 [2015] is not a valid plea.*

So the Court believes that we have, essentially, two choices. The first choice is to redo the plea and then proceed straight into sentencing. The second choice would be to grant a plea withdraw [sic] and set the case

for trial. So we're going to pause and let you [defense counsel] confer with your client [McComb].

Thank you. We'll pause while you speak with your client.

Defense Counsel: Okay. Thank you.

The Court: Record should reflect that Defendant and Defense Counsel conferred. Defense Counsel, did you wish to place anything of record as a result of your conversation with your client?

Defense Counsel: Yes, Your Honor. [McComb] does not wish to withdraw his plea at this time [sic] to whatever measures we need to take in order to ascertain his understanding of the consecutive nature of the agreed sentence. We would, obviously, concede or ask the Court to make that colloquy clear for the record and request that we proceed to sentencing.

The Court: Thank you. *** Mr. McComb, could you hear what the lawyers and the Court had to say?

McComb: Yes, Your Honor.

The Court: Did we say anything you did not understand?

A: No, Your Honor.

Q: Is it still your desire to enter a plea of guilt in this case?

A: Yes, Your Honor.

{¶ 13} The trial court then proceeded to orally inform McComb of his rights pursuant to Crim.R. 11, as it had done days earlier on April 1, 2015. In this instance, however, the trial court properly informed McComb before accepting his guilty plea that

any prison sentence he received in the instant case would have to be served consecutively to the sentence he was serving for his conviction in Madison County.

The Court: Your sentence in this case – at the end of this sentence in this case the Court has to decide whether your sentence would run concurrent or consecutive to your current charges. Concurrent means it runs at the same time and consecutive means it runs one after the other. *If the Court were to place you on community control, or probation as it is known, the Court could make your sentence run concurrent or consecutive. But if the Court imposes a prison term in your case, your prison term is required to be consecutive to your Madison County prison term. Do you understand that?*

McComb: Yes, sir.

{¶ 14} Upon review, we conclude that McComb’s claim of ineffective counsel fails because he cannot establish “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Initially, we note that the failure of McComb’s counsel to inform him at the original plea hearing that he was subject to mandatory consecutive sentences was clearly deficient. After becoming aware that the initial guilty plea entered by McComb was invalid, however, the trial court provided him with the option of either withdrawing his plea or permitting the trial court to “redo” the plea colloquy, including all of the relevant information regarding the mandatory consecutive sentences. McComb chose the latter option, and the trial court fully explained on the record that any prison sentence he received in the instant case would have to be served consecutively to the sentence he was serving for his conviction

in Madison County. Significantly, the plea form signed by McComb states the following:

CONSECUTIVE TO MADISON COUNTY FINDINGS

The Court finds that due to the nature of Defendant's Madison County Conviction in Case No. CR 20140185 (Failure to Comply with the Order or Signal of a Police Officer, a felony of the third degree), R.C. 2929.14(C)(3) *requires the imposition of consecutive sentences.*

{¶ 15} On the record before us, McComb has failed to establish that he was prejudiced in any way by his counsel's deficient performance. We therefore find that McComb entered his guilty plea in a knowing, voluntary, and intelligent manner.

{¶ 16} McComb's sole assignment of error is overruled.

{¶ 17} McComb's sole assignment of error having been overruled, the judgment of the trial court is affirmed.

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

Copies mailed to:

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