

**IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
VAN WERT COUNTY**

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 15-14-05

v.

BOBBY L. PANNING,

OPINION

DEFENDANT-APPELLANT.

**Appeal from Van Wert County Common Pleas Court
Trial Court No. 13-05-059**

Judgment Affirmed

Date of Decision: April 13, 2015

APPEARANCES:

Dillon W. Staas, IV for Appellant

Eva J. Yarger for Appellee

WILLAMOWSKI, J.

{¶1} Defendant-appellant, Bobby L. Panning (“Panning”), brings this appeal from the judgment of the Common Pleas Court of Van Wert County, Ohio, finding him guilty of sexual battery, a felony of the third degree in violation of R.C. 2907.03 after a plea of guilty to this charge, sentencing him to sixteen months in prison, and classifying him as a sexual predator. In this appeal, Panning demands reversal due to allegedly ineffective assistance of counsel at resentencing. For the reasons that follow, we affirm the trial court’s judgment.

Relevant Background

{¶2} Panning was indicted on May 3, 2013, in a two-count indictment. Count one charged Panning with rape, a felony of the first degree in violation of R.C. 2907.02(A)(1)(b). Count two charged Panning with sexual battery, a felony of the second¹ degree in violation of R.C. 2907.03(A)(5). (R. at 2.) The charges related to events that occurred over ten years earlier, in October 2002. Attorney Scott R. Gordon (“attorney Gordon”), was appointed to represent Panning. On September 5, 2013, count two was amended to reflect law at the time of the offense, which resulted in reducing the degree of the felony in count two, from

¹ Although the indictment in the record reflects a hand-written change in the degree of the felony to “third,” this correction must have been made at a later time, as all the initial documents in the case referred to a second-degree felony sexual battery. (*See, e.g.*, R. at 9, Return of Service, Attach.; Arraignment Hr’g Part 2 Tr. at 6, May 8, 2013.)

second to third degree.² (*See* Change of Plea Hr’g Tr. at 9, Sept. 5, 2013.) Also on September 5, 2013, Panning indicated his desire to enter a plea of guilty to count two, in exchange for the State dismissing count one. (*Id.* at 10, 19; R. at 40, Pet. Enter Plea of Guilty.) The trial court conducted the plea colloquy, after which it accepted the plea of guilty to count two, sexual battery, and ordered a presentence investigation. (Change of Plea Hr’g Tr. at 18-19; R. at 44.)

{¶3} The sentencing hearing took place on October 17, 2013. Panning’s counsel made a statement affirming the accuracy of the presentence investigation report and referring to the “offender’s version of the events,” as well as Panning’s letter to the court, which was made a part of the record. (Sentencing Hr’g Tr. at 22, Oct. 17, 2013.) Panning made a statement as well, indicating that he was not responsible for the crimes for which he was being sentenced. (*Id.* at 22-24.) He stated,

I accepted this plea for the fact that I know that if I didn’t, that if I went to trial, my own attorney informed me that, you know, there’s a possibility that I could be imprisoned for the rest of my life, you know, fighting on appeal.

(*Id.* at 24.) Panning’s letter included similar statements. (*Id.*, Attach.) The trial court considered Panning’s letter, the victim’s statement, and a presentence investigation report, before announcing the sentence. The trial court then sentenced Panning to sixty months in prison, to run consecutively to another

² No amended indictment was filed, however, and the correction was made on the initial indictment by crossing out and replacing some wording. (R. at 2.) (See our comment in fn. 1 above.)

sentence that Panning was serving at the time. (*Id.* at 27.) The trial court further classified Panning “as a Tier III sex offender.” (*Id.* at 29.)

{¶4} Panning appealed, through his new counsel, attorney Dillon W. Staas, IV (“attorney Staas”). On appeal Panning alleged that the trial court erred by “(1) classifying him as a Tier III Sex Offender; and (2) imposing consecutive sentences.” *State v. Panning*, 3d Dist. Van Wert No. 15-13-07, 2014-Ohio-1880, ¶ 1. He also alleged that his trial counsel was ineffective for failure to bring the two errors to the trial court’s attention. *Id.* We reversed, holding that the tier system classification under the Adam Walsh Act was not in effect at the time of the instant offense; therefore, the trial court erred in using improper law for the sex offender classification. *Id.* We also found error in the trial court’s failure to make necessary findings for the imposition of consecutive sentences. *Id.* at ¶ 13. Without addressing the ineffective assistance of counsel argument due to it being moot, we remanded the case for resentencing. *Id.* at ¶ 18-19.

{¶5} When the case returned to the trial court, Panning was again represented by attorney Gordon. At the resentencing hearing, which took place on August 13, 2014, the trial court asked Panning, “Do you have any legal cause why sentence should not now be pronounced?” (Re-sentencing Hr’g Tr. at 2, Aug. 13, 2014.) Mr. Gordon responded for Panning that there was no legal cause why sentence should not be pronounced. (*Id.*) Although Mr. Gordon had no evidence to present or a statement to make at sentencing, he indicated that Panning had

prepared a statement. (*Id.* at 2-3.) Panning again claimed innocence and argued that he was being set up. (*Id.* at 3-6.) He additionally stated “I did not have effective assistance of counsel to begin with.” (*Id.* at 3.) Although Panning did not deny his desire to plead guilty, he explained,

The only reason that, that I took this plea to begin with was for the simple fact that I was threatened, saying that if I did not that I would end up going to trial where I would end up getting convicted anyways and spend the rest of my life in prison.

(*Id.*)

{¶6} The trial court stated that it had “considered the information presented at the sentencing hearing and the record,” before pronouncing the sentence. (*Id.* at 7.) The trial court then imposed “a basic prison term” of sixty months, to be served consecutively to the prison term that Panning was serving at the time. (*Id.* at 8; R. at 81.) The trial court further found that Panning “was determined to be Sexual Predator as defined in R.C. 2950.01(E) in effect at that time.”³ (R. at 81.)

{¶7} Through attorney Staas, Panning appeals his resentencing, alleging one assignment of error.

Appellant was denied his right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 10 of the Ohio Constitution, and he was prejudiced as a result.

Analysis

³ No irregularities are alleged with respect to the sentence imposed or the classification.

{¶8} Panning alleges that his trial counsel was ineffective for failure to make “any statement at resentencing, specifically by failing to move to withdraw Appellant’s guilty plea.” (App’t Br. at iv.) His appeal is limited “to his right to counsel at the resentencing hearing.” (*Id.* at 3.)

{¶9} In order to prevail on a claim of ineffective assistance of counsel, a criminal defendant must first show that the counsel’s performance was deficient in that it fell “below an objective standard of reasonable representation.” *State v. Keith*, 79 Ohio St.3d 514, 534, 684 N.E.2d 47 (1997). Second, the defendant must show “that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial.” *Id.*, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In the record before us, there is no evidence that attorney Gordon acted deficiently “by failing to move to withdraw Appellant’s guilty plea.” (App’t Br. at iv.)

{¶10} We addressed an argument similar to Panning’s in *State v. Smith*, 3d Dist. Wyandot No. 16-02-12, 2003-Ohio-393. There, the defendant alleged ineffective assistance of counsel claiming that “just prior to the sentencing,” he had “requested counsel to move for withdrawal of his previously entered guilty plea and that counsel failed to do so.” *Id.* at ¶ 7. Although the defendant attached two affidavits to his appellate brief in support of his claims, “the record before the trial court [was] devoid of any evidence that Appellant requested counsel to withdraw his guilty plea.” *Id.* at ¶ 8. We held, “without any additional evidence

that Smith requested to withdraw his plea, he has failed to establish any ineffective assistance on the part of his counsel.” *Id.* See also *State v. Cookson*, 2d Dist. Montgomery No. 13368, 1993 WL 189921, *9-10 (June 1, 1993) (rejecting allegations of ineffective assistance of counsel for failure to move for a plea withdrawal following the defendant’s claim of innocence made at sentencing, because “nowhere in the sentencing hearing did appellant state that he wanted to withdraw his guilty plea[,] although he protested his innocence when the trial court asked him if he had anything to say”).

{¶11} In the instant case, like in *Smith*, there is no evidence that Panning had ever asked attorney Gordon to move for a withdrawal of his guilty plea. In fact, Panning does not even allege that he wanted to withdraw his plea. He suggests that his trial counsel should have, sua sponte, requested the plea withdrawal, in spite of the fact that Panning wanted to enter the plea in order to avoid spending “the rest of [his] life in prison,” the desire which he confirmed at his initial sentencing hearing and reiterated at resentencing. (Re-sentencing Hr’g Tr. at 3; see also Sentencing Hr’g Tr. at 24.) Without any evidence that Panning had, at any point, requested that his plea be withdrawn and that his counsel ignored the request, we cannot find that attorney Gordon’s assistance fell “below an objective standard of reasonable representation” for failure to move for the plea withdrawal. *Keith*, 79 Ohio St.3d at 534, 684 N.E.2d 47. Accordingly, Panning has failed to satisfy the first prong of the test for ineffective assistance of counsel.

{¶12} We further note that Panning does not allege that there existed any grounds for plea withdrawal other than a mere change of heart, which is insufficient. *See State v. Pettaway*, 3d Dist. Seneca No. 13-14-20, 2015-Ohio-226, ¶ 35; *State v. Broderdorp*, 3d Dist. Seneca No. 13-11-11, 2011-Ohio-4894, ¶ 25. Therefore, he has no basis to claim that he was prejudiced by his counsel’s “failure to perform a futile act.” *State v. Siler*, 11th Dist. Ashtabula No. 2010-A-0025, 2011-Ohio-2326, ¶ 64 (rejecting a claim of ineffective assistance of counsel for failure to move to withdraw plea where there was “nothing in the record to suggest that had his counsel moved to withdraw the plea * * * , the court would have allowed the motion”); *see also State v. Johnson*, 8th Dist. Cuyahoga No. 99620, 2013-Ohio-5744, ¶ 15-20 (rejecting a claim of ineffective assistance of counsel for failure to move to withdraw the defendant’s guilty plea in light of the statements at sentencing in which he proclaimed his innocence where nothing showed that “a motion to withdraw would have been successful because it was premised on nothing more than a change of heart”).

{¶13} For the forgoing reasons, the assignment of error is overruled.⁴

⁴ We note that Panning’s brief cites cases that require the trial court “to inquire into claims of dissatisfaction with appointed counsel.” (App’t Br. at 5, citing *State v. Deal*, 17 Ohio St.2d 17, 244 N.E.2d 742 (1969), and *State v. King*, 104 Ohio App.3d 434, 662 N.E.2d 389 (4th Dist.1995). Yet, Panning does not assign an error to the trial court’s failure to inquire into his complaints at resentencing.

Conclusion

{¶14} Having reviewed the arguments, the briefs, and the record in this case, we find no error prejudicial to Appellant in the particulars assigned and argued. The judgment of the Common Pleas Court of Van Wert County, Ohio is therefore affirmed.

Judgment Affirmed

ROGERS, P.J. and PRESTON, J., concur.

/jlr