

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

STATE OF OHIO, : Case No. 14CA16
Plaintiff-Appellee, :
v. : DECISION AND
TERRY LEE GANNON, JR., : JUDGMENT ENTRY
Defendant-Appellant. : **RELEASED: 04/21/2015**

APPEARANCES:

Robert C. Delawder, Ironton, Ohio and Michael J. Curtis, Curtis Legal Services, PSC, Ashland, Kentucky, for appellant.

Brigham M. Anderson, Lawrence County Prosecuting Attorney, and W. Mack Anderson, Lawrence County Assistant Prosecuting Attorney, for appellee.

Harsha, J.

{¶1} Terry Lee Gannon, Jr. pleaded guilty to violating four counts of trafficking in drugs. After determining that Gannon had entered his plea voluntarily, the Lawrence County Court of Common Pleas convicted him of these charges and imposed concurrent sentences resulting in an aggregate prison term of eight years in prison.

{¶2} Gannon claims that he was denied his Sixth Amendment right to confront the state's evidence against him because he was denied an opportunity to review audio and video tapes, as well as other discovery, provided by the state. However, he pled guilty. Thus he forfeited any errors concerning discovery and the right to confrontation because a guilty plea precludes him from raising claims of statutory or constitutional violations that occurred prior to when he entered the plea.

{¶3} In his second assignment of error Gannon claims he did not knowingly, intelligently, and voluntarily enter his guilty plea because he received ineffective assistance of counsel. A guilty plea does not forfeit that challenge. Nonetheless, much of the factual basis for his challenge is an affidavit attached to his appellate brief, i.e. evidence outside the record on appeal. Because he relies on material outside the record, he cannot obtain relief on direct appeal. If he has a remedy, it involves post-conviction relief. To the extent he bases his arguments on the record, the evidence supports neither a finding of deficient performance by counsel nor prejudice.

I. FACTS

{¶4} Gannon was the subject of a Lawrence County Drug and Major Crimes Task Force investigation. According to the affidavit of a police investigator involved, several detectives and investigators met with a confidential informant to discuss the informant's past drug transactions with Gannon and a debt that the informant owed to Gannon. The informant called Gannon to set up a partial payment of the debt and to inquire about the possible purchase of oxycodone. This conversation was recorded. The investigators searched the informant to determine that he was not in possession of contraband or money, then provided him with marked money for the payment of the debt, as well as a possible drug purchase. An investigator provided the informant with an audio-video recording device and transported him to Gannon's residence while three other detectives followed them. The investigator witnessed the informant enter Gannon's residence. According to the informant, an infant and a young boy approximately 13 years old were present in the living room. Gannon and the informant discussed Gannon's drug trafficking business and Gannon allegedly stated that he did

not have any oxycodone but that he was expecting something big to happen in about a week; he asked the informant to call him back then. The informant left Gannon's residence without making a drug purchase. The investigator witnessed the informant leave Gannon's residence and return to the investigator's vehicle. The two then returned to the staging area and met with the three other detectives who searched the informant and verified he was not in possession of any contraband.

{¶15} Seven days later, the informant and the investigation team met again. The informant stated that Gannon had called him that day and told him that he had 240 Oxycodone 30 mg tablets. The informant then placed a recorded telephone call to Gannon and the two discussed the sale and purchase of oxycodone tablets. Shortly thereafter, the informant placed a second call to Gannon and established a time and quantity for purchase. The investigative team repeated their steps for the second transaction, searching the informant for contraband and providing him with marked bills and an audio-video recording device. An investigator transported the informant to Gannon's residence and witnessed him approach the residence on foot. According to the informant, Gannon's wife was with an infant and invited him inside. The informant saw two young male children, approximately seven and twelve years of age in the living room. Gannon sold the informant five oxycodone 30 mg tablets for \$200. The informant left Gannon's residence, returned to the investigator's vehicle and turned over five oxycodone 30 mg tablets to the investigator. The investigative team returned to the staging area where they searched the informant again and verified he had no additional contraband.

{¶16} Two days later the informant and the investigative team met again. The informant stated he had a telephone call with Gannon the night before and Gannon had stated that he had Oxycodone tablets available for purchase. The informant then placed a recorded telephone call to Gannon informing him that he wanted to purchase 16 or 17 oxycodone tablets and Gannon told him to come over to his residence. The investigators searched the informant for contraband, gave him marked bills, provided him with an audio-video recording device, transported him to Gannon's residence, and witnessed him approach the residence. The informant again witnessed the presence of an infant and two young children at the residence. Gannon sold 17 oxycodone 30 mg tablets in exchange for the marked money. The informant left Gannon's residence, returned to the investigator's vehicle, and turned over 17 oxycodone 30 mg tablets to the investigator. The team returned to the staging area and the informant was searched.

{¶17} Gannon made two more sales of oxycodone to the informant over the course of the next sixteen days, both which were carried out by the investigative team in the same manner as the prior two purchases. Two additional telephone calls between the informant and Gannon were recorded, but no drug purchases were made on those days.

{¶18} Based on the drug transactions between Gannon and the informant, the police sought a search warrant for Gannon's residence. To support the warrant request, an investigator involved in the surveillance provided an affidavit describing the events between Gannon and the informant. The investigator testified that he had reviewed all the recordings of the controlled substance purchases and it was clear from the audio-video recordings that the informant purchased oxycodone from Gannon at Gannon's

residence. The court issued a warrant and the police seized additional oxycodone tablets from Gannon's residence.

{¶9} The Lawrence County Grand Jury indicted Gannon on four counts of drug trafficking, three of which were third degree felonies and one which was a second degree felony. Gannon initially pleaded not guilty and retained private counsel.

{¶10} His counsel filed a request for a bill of particulars under Crim.R. 7(E) and a motion for discovery under Crim.R. 16. The state responded to Gannon's discovery request, providing a copy of the compact disc containing Gannon's audio recorded statements; Gannon's criminal record; a list of documents and tangible objects to be offered as evidence at the trial, including the search warrant and related inventory sheet; the investigator's affidavit in support of the search warrant; the identity of trial witnesses, including the detectives and investigators involved in the surveillance; photographs; and the Bureau of Criminal Investigation laboratory report of the drugs sold by and seized from Gannon showing them to be oxycodone.

{¶11} Although the state provided a copy of the compact disc with Gannon's recorded statements to Gannon's counsel, it did not provide a copy of the audio-video recordings of the drug purchases due to concerns for the safety of witnesses. Instead, it stated that Gannon's counsel may contact the prosecuting attorney's office to make arrangements to view and listen to the audio-video recordings. The record is silent as to whether Gannon's counsel reviewed the audio-video recordings.

{¶12} The parties engaged in plea negotiations, with Gannon's counsel describing them on the record before the court as "a period of long and difficult negotiations." The state presented a final offer, both in writing and at a hearing, in which

it stated that Gannon has been advised that if he is found guilty at trial, he could be sentenced to 17 years in prison; however, in exchange for his guilty plea, the state would recommend eight years in prison with no opposition to judicial release after Gannon had served six years.

{¶13} At that hearing, Gannon's counsel stated that he communicated the state's offer to Gannon and that it is his practice to communicate every offer made by the state to his clients.

{¶14} Gannon accepted the plea bargain, pled guilty, and received a sentence of eight years in prison. This appeal ensued.

II. ASSIGNMENTS OF ERROR

{¶15} Gannon assigns the following errors for our review:

1. Appellant/Gannon was denied his Sixth Amendment right to confront the State's evidence against him as he was denied an opportunity to review audio and video tapes as well as other discovery provided by the state.
2. Appellant/Gannon was denied his Sixth Amendment right to effective counsel by counsel's failure to investigate the allegations in the indictment and the facts provided to Appellant in discovery; failure to file pre-trial motions and keep Gannon informed of the proceedings and the process and denied Gannon an opportunity to review the discovery. As a result Gannon did not make an informed plea and therefore did not enter into a knowing and voluntary plea. Gannon was thereby denied effective assistance of counsel in the plea bargaining process.

III. LAW AND ANALYSIS

A. Sixth Amendment Right to Confrontation

{¶16} Gannon asserts that his Sixth Amendment right to confront the state's evidence against him was violated when he was not given the opportunity to view the

audio-video tapes prior to entering his guilty plea. However, Gannon did not challenge the state's decision to restrict disclosure of the audio-video tapes in the trial court.

Gannon cannot raise an issue for our review without having presented it to the trial court initially. *State v. Jacobson*, 4th Dist. Adams App. No. 01CA730, 2003-Ohio-1201, ¶ 9, citing *State v. Awan*, 22 Ohio St.3d. 120, 122, 489 N.E.2d. 277 (1986). And because Gannon pled guilty, he forfeited his right to raise claims of statutory, procedural, and constitutional deprivations that occurred before he entered the plea. *State v. Shaffer*, 4th Dist. Lawrence App. No. 14CA15, 2014-Ohio-4976, ¶ 18, citing *State v. Ketterer*, 111 Ohio St.3d. 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 105. Likewise, we do not consider plain error in the absence of such an assertion. See, *State v. Quarterman*, 140 Ohio St.3d. 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 2. We overrule Gannon's first assignment of error.

B. Ineffective Assistance of Counsel

{¶17} Gannon contends that he was denied his Sixth Amendment right to effective counsel because his counsel failed to investigate the allegations in the indictment, failed to file pretrial motions, and denied Gannon the opportunity to review discovery, resulting in Gannon's failure to make an informed, knowing, and voluntary plea agreement. His guilty plea does not forfeit this issue. *Shaffer*, supra ¶ 19.

{¶18} To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d

1121, ¶ 113; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Knauff*, 4th Dist. Adams No. 13CA976, 2014-Ohio-308, ¶ 23. The defendant has the burden of proof because, in Ohio, a properly licensed attorney is presumed competent. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 62. Failure to satisfy either part of the test is fatal to the claim. *Strickland* at 697; *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989).

{¶19} Here, much of Gannon’s evidence to support his argument is presented through an affidavit submitted with his appellate brief. The affidavit is outside the record transmitted on appeal. App.R. 9(A) limits our consideration to “original papers and exhibits thereto filed in the trial court * * *.” Consequently, we cannot consider the affidavit in evaluating Gannon’s claim of ineffective assistance of counsel and review only the evidence on the record before us. *State v. Callihan*, 80 Ohio App.3d 184, 197, 608 N.E.2d 1136 (4th Dist. 1992). To the extent that appellant’s application relies on supplemental materials outside the record to substantiate his claims of error during pre-trial proceedings, we note that the proper avenue to pursue is the filing of a petition for post conviction relief.

{¶20} Gannon’s claim that his attorney did not properly investigate the facts is not credible. The record indicates that defense counsel requested a bill of particulars under Crim.R. 7(E) and demanded discovery under Crim. R. 16. See *State v. Knott*, 4th Dist. Athens App. No. 03CA06, 2004-Ohio-510 (defendant’s ineffective assistance of counsel claim was not credible where record showed defense counsel requested discovery and a bill of particulars).

{¶21} Next, Gannon argues that his counsel was ineffective for failing to file a suppression motion. He contends that the state's case depended upon the veracity of the informant and that the informant's past reliability and history with the police was not set forth in the investigator's affidavit in support of the search warrant. As a result, he claims his counsel should have filed a motion to suppress the items seized from the execution of the warrant so that he could have challenged the veracity of the informant and gained greater leverage in the plea negotiation process.

{¶22} The failure to file a motion to suppress does not constitute per se ineffective assistance of counsel. *State v. Waters*, 4th Dist. Vinton App. No. 13CA693, 2014-Ohio-3109; *State v. James*, 4th Dist. Ross No. 13CA3370, 2013-Ohio-5475, ¶ 19; *State v. Walters*, 4th Dist. Adams No. 12CA949, 2013-Ohio-772, ¶ 20. Instead, the failure to file a motion to suppress amounts to ineffective assistance of counsel only when the record demonstrates that the motion would have been successful if made. *Id.*, see, *State v. Resendiz*, 12th Dist. Preble No. CA2009, 04-012, 2009-Ohio-6177, ¶ 29. We conclude there was not a reasonable probability that the motion would have been successful if made.

{¶23} Crim.R. 41(C) sets forth the procedure for issuing search warrants. It provides: "A warrant shall issue under this rule only on an affidavit or affidavits sworn to before a judge or a court of record and establishing the grounds for issuing the warrant. * * * If the judge is satisfied that probable cause for the search exists, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be

credible and for believing there is a factual basis for the information furnished. * * *

Crim.R. 41(C).

{¶24} When reviewing a request for a search warrant, the issuing magistrate or judge must “make a practical, common-sense decision whether given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *State v. George*, 45 Ohio St.3d 325, 544 N.E.2d 640, (1989) paragraph one of the syllabus, quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Thus, probable cause does not require a prima facie showing of criminality. *Id.* at 329. Rather, probable cause is satisfied if there is a probability, given the totality of the circumstances, that evidence of criminal activity is located at the place to be searched. *George*; *State v. Raines*, 4th Dist. Ross App. No. 03CA2739, 2004-Ohio-1915.

{¶25} Our review of the police investigator’s search warrant affidavit reveals that it is not exclusively dependent on the confidential informant’s information as Gannon argues. The affiant, Investigator Adkins, was directly involved in Gannon’s investigation and had personally observed some of the drug activities. As his affidavit indicates, he or other investigators searched the informant prior to the drug purchases, gave the informant marked money for the drug buys, provided the informant with audio-video recording devices, recorded telephone conversations between informant and Gannon, witnessed informant coming and going from Gannon’s residence, and obtained oxycodone tablets from informant immediately after the informant left Gannon’s residence. The affiant also stated that he had personally reviewed the audio-video

recordings made of the controlled purchases and it was clear to him that the informant did purchase oxycodone from Gannon at Gannon's residence.

{¶26} Although Gannon argues that the affidavit did not provide any indication as to why the confidential informant could be considered reliable, the absence of such information does not render an affidavit fatally defective. This is especially true where much of the information set forth by the affiant was based on his personal observations, not the confidential informant's statements. *See Illinois v. Gates*, 462 U.S. 213, 238-239, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (repudiating the previously required element of proof of the confidential informant's reliability in favor of a totality of the circumstances approach); *see also, State v. Smith*, 11th Dist. Ashtabula App. No.2004-A-0088, 2006-Ohio-5186 (finding an affidavit was supported by probable cause even though affiant did not state the reasons why confidential informant could be considered reliable).

{¶27} Based upon the personal knowledge of the affiant, Gannon's counsel was not ineffective for failing to move to suppress the evidence obtain from the search of Gannon's residence, i.e. counsel could reasonably have decided that filing a motion to suppress would have been a futile act.

{¶28} Gannon also claims that statements made by the informant concerning the presence of children during the alleged drug transactions resulted in increased penalties under the drug trafficking statutes. He contends that his lack of knowledge about what is shown on the audio-video tapes concerning the presence of children undermined his ability to meaningfully participate in plea negotiations. However, the record shows that the state provided Gannon a copy of certain audio recordings and provided Gannon's

counsel the opportunity to view the audio-video tapes of the controlled drug purchases. And, as we previously held, Gannon failed to challenge the state's position concerning non-disclosure of the audio-video tapes in the trial court. Thus the record fails to support his claim that his lack of knowledge about the existence or non-existence of children on the tapes prejudiced him in any way. If Gannon had relevant facts concerning the presence of children, he was not prevented from sharing those with his counsel.

{¶29} Finally, Gannon claims that his counsel failed to communicate with him during the plea negotiations and that he was coerced into making a guilty plea because his defense counsel told him he would have to spend 17 years in the state penitentiary without any chance of parole. The only evidence of record includes a hearing of the state's final offer and shows that Gannon's counsel read the state's final offer to him and gave it to him to sign. The final offer was filed by the prosecuting attorney and states:

In exchange for a plea, the State of Ohio would recommend the following sentence: 8 years in prison and not oppose Judicial Release after the defendant has served 6 years. The Defendant has been advised and understands if found guilty of the Indictment as charged, he could be sentenced to 17 years in the appropriate penal institution.

{¶30} The final offer contains Gannon's signature. Furthermore, Gannon responded to a questionnaire concerning his understanding of his rights. He answered that he had confidence in his attorney and that there were no promises, threats or inducement made to him to persuade him to plead guilty. The questionnaire has his signature and is dated March 12, 2014.¹

¹ In its brief the state makes references to Gannon's affirmations concerning his rights and understandings at the plea hearing and cites to pages of the plea hearing transcript to support its argument that Gannon's plea was entered knowingly and voluntarily. However, we note that the record before us does not include a transcript of the March 12, 2014 plea hearing. The record references and

{¶31} Gannon has failed to establish deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation. The record shows that his counsel did not fail to investigate the facts. And, counsel's decision not to file a motion to compel the state to provide the surveillance tapes to Gannon or a motion to suppress evidence seized based on the search warrant was not ineffective where he could have reasonably decided that the filing of those motions would have been futile.

{¶32} Moreover, even if we assume his counsel made errors, Gannon has failed to show any prejudice, i.e. a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. The record shows that Gannon was the subject of a carefully planned and deliberately executed drug and task force investigation. At least four different detectives and investigators coordinated four controlled purchases of oxycodone from Gannon and set up a confidential informant with an audio-video recording device that recorded the four transactions. The task force also had recorded telephone conversations between Gannon and the informant. If found guilty as charged in the indictment, Gannon faced 17 years in prison. Despite this weighty evidence, Gannon's counsel was able to obtain a plea offer that resulted in a sentence of eight years – less than half of the maximum prison term he could have received had he been convicted at trial. Gannon has failed to provide any evidence that there was a reasonable probability that he would have not been found guilty or, having been found guilty, that the trial court would have sentenced him to less than the 17 years permitted by law.

{¶33} Gannon has not established that his counsel was constitutionally ineffective. Therefore his claim that his plea was not “voluntary” fails. We overrule his second assignment of error.

IV. CONCLUSION

{¶34} We overrule both of Gannon’s assignments of error and we affirm the trial court’s judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. & McFarland, A.J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.