[Cite as *State v. Dixon*, 2009-Ohio-3137.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2008CA00254
DEDRIC T. DIXON	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Alliance Municipal Court Case No. 2007-CRB-01751
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	June 22, 2009

APPEARANCES:

For Plaintiff-Appellee:

JENNIFER ARNOLD 0070848
Assistant Prosecutor
City of Alliance
470 E. Market Street
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For Defendant-Appellant:

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Delaney, J.

{¶1} Defendant-Appellant, Dedric Dixon, appeals from the trial court's judgment entry denying his post-sentence motion to withdraw his guilty plea. The State of Ohio is Plaintiff-Appellee.

{¶2} Appellant was arrested on October 28, 2007, on one count of domestic violence, a felony of the fourth degree. The charged ensued after Appellant's girlfriend told police that Appellant had punched her numerous times while at their residence in Alliance, Ohio. She also told police that Appellant dragged her through the residence and threatened to slice her face with a knife. A preliminary hearing was held on November 5, 2007, and the case was bound over to the grand jury.

{¶3} On December 19, 2007, the Stark County Grand Jury remanded the case to the Alliance Municipal Court on one count of Intimidation of a Victim/Witness in a Criminal Case, a misdemeanor of the first degree, in violation of R.C. 2921.04(A). Appellant's arraignment was held on December 21, 2007, and his first pretrial was set for December 24, 2007. At the time of his pretrial, Appellant had fifty-seven days of jail time credit.

{¶4} At the pretrial, Appellant pled no contest to the charge of victim intimidation. The trial court sentenced him to time served and gave him probation and ordered him to complete anger management courses.

{¶5} Apparently, Appellant was also on post-release control for an unrelated felony offense in Mahoning County. Subsequently, his post-release control was revoked by the Adult Parole Authority and he was returned to prison on the felony offense.

{¶6} On March 28, 2008, Appellant filed a post-sentence motion to withdraw his guilty plea. A hearing was held on the motion on April 21, 2008. Appellant was present at the hearing, but chose not to testify on his own behalf.

{¶7} Appellant's probation officer, Kyle Billingsly, testified and stated that regardless of whether Appellant had pled guilty to the charge, he would have still sought to have Appellant's post-release control revoked based on the activities alleged to have occurred in the underlying criminal matter. Billingsly indicated during the hearing that there was also another incident in October, 2007, that caused him concern when Appellant had engaged in another argument with his girlfriend.

{¶8} The trial court ruled that Appellant had not met the burden of proving a manifest injustice that would warrant a withdrawal of his guilty plea. The court denied Appellant's motion.

{¶9} Appellant raises two Assignments of Error:

{¶10} "I. THE TRIAL COURT ABUSED ITS DISCRETION IN (1) FAILING TO HOLD A HEARING ON APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA; AND (2) IN DENYING APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA.

{¶11} "II. THE APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL."

I.

{¶12} In his first assignment of error, Appellant alleges that the trial court abused its discretion in failing to hold a hearing on Appellant's motion to withdraw his guilty plea and also for denying the motion to withdraw his guilty plea. We disagree.

{¶13} We can quickly dispose of the first prong of this assignment of error, as the trial court did in fact hold a hearing on Appellant's motion on April 21, 2008. Appellant cites to the transcript of that hearing in his brief. As such, the first prong of the assignment of error warrants no further consideration.

{¶14} Regarding the second prong of Appellant's first assignment of error, we also find that the trial court did not err in denying the motion.

{¶15} Criminal Rule 32.1 governs the withdrawal of guilty pleas. Specifically, Crim. R. 32.1 states, "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."

{¶16} If a defendant seeks to withdraw his guilty plea after sentence has been imposed, he must establish the existence of manifest injustice. *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph one of the syllabus. "The logic behind this precept is to discourage a defendant from pleading guilty to test the weight of potential reprisal, and later withdraw the plea if the sentence was unexpectedly severe." *State v. Caraballo* (1985), 17 Ohio St.3d 66, 67, 477 N.E.2d 627, citing *State v. Peterseim* (1980), 68 Ohio App.2d 211, 213, 428 N.E.2d 863.

{¶17} Manifest injustice has been defined as a "fundamental flaw in the proceedings which results in a miscarriage of justice or is inconsistent with the demands of due process." *State v. Brown* (2006), 167 Ohio App.3d 239, 854 N.E.2d 583. The burden of proving manifest injustice rests on the defendant and must be supported with specific facts either from the record or affidavits in support of the motion. *Smith*, supra.

{¶18} The credibility and weight of the movant's assertions in a motion to withdraw a guilty plea are to be resolved at the discretion of the trial court. *Smith*, supra, at paragraph 2 of the syllabus.

{¶19} In Appellant's motion to withdraw his guilty plea, he asserts that the sole reason for seeking to withdraw his guilty plea was that he did not know he would be returned to prison for violating his post-release control in a separate case. Specifically, Appellant asserted in his motion that "had [he] been aware of this particular possible consequence he would not have entered the 'no contest' plea and would have asked the court for a trial date."

{¶20} Appellant appears to argue that the trial court failed to comply with Crim. R. 11(D) which states the court shall advise the "defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily." He suggests that the trial court was required to advise him of the effect that his plea would likely have on his parole for the prior felony offense. We have never construed Rule 11(D) to include a requirement that the trial court advise a defendant of every potential collateral consequence of a guilty plea. In many cases, the revocation of probation or parole will not involve the same trial judge or even the same jurisdiction. There also is nothing in the record suggesting the trial court was even aware of Appellant's post-release control conditions out of the Mahoning County case.

{¶21} Upon review, we find the trial court did comply with Crim. R. 11(D) and did engage Appellant in full colloquy of his rights. As this Court has previously stated, "when a petitioner submits a claim that his guilty plea was involuntary, a record reflecting

compliance with Crim. R. 11 has greater probative value than a petitioner's self-serving affidavit." *State v. Surface*, 5th Dist. No. 2008-CA-00184, 2009-Ohio-950.

{¶22} In the present case, Appellant sought to enter his guilty plea to quickly dispose of his case on Christmas Eve. The trial court was under no obligation under the criminal rules to inquire as to whether Appellant was on post-release control in another case or to determine whether that post-release control would be revoked if he pled guilty in an unrelated misdemeanor case.

{¶23} Moreover, Appellant's probation officer testified at the motion hearing that even had Appellant not been convicted of the charge of victim intimidation, he still would have sought to have Appellant's post-release control revoked.

{¶24} Appellant, having been apprised of his rights, knowingly, voluntarily, and intelligently entered a guilty plea in this case and has failed to demonstrate any manifest injustice that would warrant the withdrawal of his guilty plea.

{¶25} Appellant's first assignment of error is overruled.

II.

{¶26} In his second assignment of error, Appellant argues that trial counsel was ineffective in failing to inquire as to whether Appellant was on post-release control and in failing to inform Appellant of the potential consequences that his plea would have on his probation.

{¶27} {¶1} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that his trial counsel acted incompetently. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. In assessing such claims, "a court must indulge a strong presumption that counsel's

conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689, quoting *Michel v. Louisiana (*1955), 350 U.S. 91, 101, 76 S.Ct. 158, 164.

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

{¶29} Even if a defendant shows that his counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this "actual prejudice" prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

{¶30} When counsel's alleged ineffectiveness involves the failure to pursue a motion or legal defense, this actual prejudice prong of *Strickland* breaks down into two components. First, the defendant must show that the motion or defense "is meritorious," and, second, the defendant must show that there is a reasonable probability that the outcome would have been different if the motion had been granted or the defense pursued. See *Kimmelman v. Morrison* (1986), 477 U.S. 365, 375, 106 S.Ct. 2574, 2583; see, also, *State v. Santana* (2001), 90 Ohio St.3d 513, 739 N.E.2d 798 citing *State v. Lott* (1990), 51 Ohio St.3d 160, 555 N.E.2d 293.

{¶31} A claim of trial counsel ineffectiveness usually will be unreviewable on appeal because the appellate record is inadequate to determine whether the omitted

conduct really had merit and/or because the possible reasons for counsel's actions appear outside the appellate record. *United States v. Galloway* (C.A.10, 1995), 56 F.3d 1239, 1240 (en banc) ("Such claims brought on direct appeal are presumptively dismissible, and virtually all will be dismissed."; "A factual record must be developed in and addressed by the district court in the first instance for effective review.").

{¶32} Ohio law similarly recognizes that error cannot be recognized on appeal unless the appellate record actually supports a finding of error. A defendant claiming error has the burden of proving that error by reference to matters in the appellate record. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384. "[T]here must be sufficient basis in the record * * * upon which the court can decide that error." *Hungler v. Cincinnati* (1986), 25 Ohio St.3d 338, 342, 496 N.E.2d 912.

{¶33} In *Massaro v. United States* (2003), 538 U.S. 500, 123 S.Ct. 1690, 155 L.Ed.2d 714, the United States Supreme Court emphasized the general unreviewability of trial counsel ineffectiveness claims on direct appeal. The Court stated that "[w]hen an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose."

{¶34} Additionally, the court stated that "[t]he evidence introduced at trial * * * will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis." * * *

{¶35} "If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of

knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse. * * * The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them." See also *State v. Templeton*, 5th Dist. No. 2006-CA-33, 2007-Ohio-1148. ¶91.

{¶36} Although there are rare cases where claims of trial counsel ineffectiveness can be legitimately argued on appeal, see id., the present case is not one of those cases. Whether counsel inquired into Appellant's prior criminal record and whether he was on post-release control is not a matter that can be determined within the record. Moreover, we do not know, outside of Appellant's self-serving statements, whether counsel did in fact advise him of potential consequences of pleading no contest to a new charge as it related to post-release control.

{¶37} We would also note that regardless of whether trial counsel knew of Appellant's post-release control status, guilty pleas cannot be withdrawn because of errors in the speculation of future actions of the court by counsel. In *State v. Blatnik* (1984), 17 Ohio App.3d 201, 203, 478 N.E.2d 1016, the court held that "manifest injustice, as contemplated by the rule, does not, ipso facto, result from counsel's erroneous advice that a sentence will be imposed." In *Blatnik*, the defendant supplied an affidavit attesting that he had been advised by counsel that his imprisonment would not be longer than eighteen months in the county detention facility and attested that if he knew that his imprisonment would be served in the penitentiary, he would not have pled guilty. Id. The defendant did not assert that a plea arrangement had been made, nor did the record reflect an arrangement, but only asserted that his counsel incorrectly

speculated as to what the sentence would be in his case. Id. The Court noted that the record merely reflected a plea of guilty to the indictment and a subsequent sentence, without any firm promise of sentence which induced the plea. The court ruled that counsel's promises were speculation and held that "this type of speculation by counsel does not result in manifest injustice so as to permit a Defendant who has pled guilty to withdraw his guilty plea after a sentence has been imposed." Id.

{¶38} Similarly, speculation as to whether post-release control in another case would be revoked does not demonstrate a manifest injustice, and any comments by counsel to that effect would not be considered ineffective.

{¶39} As we stated when analyzing Appellant's first assignment of error, the record demonstrates that the court complied with Crim. R. 11, and Appellant was aware of the sentence that could be imposed upon him as it related to this case. Appellant has not produced any case law stating that an alleged failure on the part of counsel to discuss the implications of pleading guilty in one case on an unrelated post-release control matter constitutes ineffective assistance.

{¶40} Appellant's second assignment of error is overruled.

{¶41} Based on the foregoing, we find Appellant's assignments of error to be without merit and therefore affirm the judgment of the Alliance Municipal Court.

By: Delaney, J.

Wise, P.J. and

Edwards, J. concur.

HON. PATRICIA A. DELANEY

HON. JOHN W. WISE

HON. JULIE A. EDWARDS

[Cite as *State v. Dixon*, 2009-Ohio-3137.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
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Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
DEDRIC T. DIXON	:	
	:	
Defendant-Appellant	:	Case No. 2008CA00254
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Alliance Municipal Court is affirmed. Costs assessed to Appellant.

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HON. PATRICIA A. DELANEY

_____

HON. JOHN W. WISE

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HON. JULIE A. EDWARDS