

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

DEANA BAYS

Defendant-Appellant

JUDGES:

Hon. Julie A. Edwards, P.J.

Hon. William B. Hoffman, J.

Hon. Patricia A. Delaney, J.

Case No. 09 CA 0099

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Richland County Common
Pleas Court, Case No. 2007-CR-481D

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

August 2, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

JAMES J. MAYER, JR.
PROSECUTING ATTORNEY
RICHLAND COUNTY, OHIO

ROBERT GOLDBERGER
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Mansfield, Ohio 44902

BY: KIRSTEN L. PSCHOLKA-GARTNER
Assistant Richland County Prosecutor
38 South Park Street
Mansfield, Ohio 44902

Hoffman, J.

{¶1} Defendant-appellant Deana Bays appeals the July 22, 2009 Judgment Entry entered by the Richland County Court of Common Pleas, which overruled her Motion to Withdraw Guilty Plea. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE¹

{¶2} On July 12, 2007, the Richland County Grand Jury indicted Appellant on three counts of receiving stolen property, in violation of R.C. 2913.51(A), felonies of the fifth degree. Appellant entered pleas of not guilty to the charges at her arraignment on August 21, 2007. The trial court scheduled the matter for jury trial on October 18, 2007.

{¶3} Prior to trial, Appellant appeared before the trial court, withdrew her former pleas of not guilty and entered pleas of guilty to the charges. In exchange for the plea, the State agreed to recommend a prison sentence of 18-24 months; recommend Appellant pay restitution in the amount of \$549.00; and dismiss Case No. 06CR372D. However, the State ultimately recommended a sentence of 24 months rather than the agreed upon 18-24 months. Subsequently, the trial courts conducted a Crim.R. 11 colloquy with Appellant. Thereafter, the trial court accepted Appellant's pleas and found her guilty as charged. The trial court immediately proceeded to sentencing, imposing a period of 8 months on each count. The trial court ordered the sentences be served consecutively to each other and consecutive to an eighteen month sentence Appellant was then serving. The trial court also ordered Appellant to pay restitution in the amount of \$549.00.

¹ A Statement of the Facts underlying Appellant's convictions is not necessary for our disposition of this appeal.

{¶4} On May 19, 2008, Appellant filed a Petition to Vacate or Set Aside Sentence/Judgment, seeking post-conviction relief pursuant to R.C. 2953.21. Therein, Appellant claimed her constitutional rights to be free from unreasonable searches and seizures had been violated. Via Judgment Entry filed December 12, 2008, the trial court dismissed Appellant's petition, finding the constitutional challenge to the legality to the search and seizure should have been raised on direct appeal; therefore, was barred by res judicata. The trial court also found Appellant's petition was untimely.

{¶5} Thereafter, Appellant filed a motion for judicial release, which the trial court overruled. Appellant filed a second motion for judicial release on April 29, 2009, which the trial court also overruled via Judgment Entry filed May 19, 2009. Appellant subsequently filed a Motion to Withdraw Guilty Plea pursuant to Crim.R. 11. Therein, Appellant claimed her guilty plea should be rendered void as she had been induced to enter the plea based upon "[a] promise that was unlawful and could not be fulfilled." June 15, 2009 Motion to Withdraw Guilty Plea pursuant to Crim.R. 11 at 2, unpaginated. The State filed a motion in opposition to which Appellant responded with a reply brief. Via Judgment Entry filed July 22, 2009, the trial court overruled Appellant's motion. The trial court found, after reviewing the transcript of the sentencing hearing as well as the sentencing entry, it had not misled Appellant into accepting the plea agreement. The trial court added the record confirmed Appellant knowingly, intelligently and voluntarily pled guilty to the offenses upon which she was indicted.

{¶6} It is from this judgment entry Appellant appeals, raising the following assignment of error:

{¶17} “I. THE TRIAL COURT ERRED IN NOT GRANTING THE APPELLANT’S MOTION TO WITHDRAW HER GUILTY PLEA.”

I

{¶18} Herein, Appellant challenges the trial court’s decision to not permit Appellant to withdraw her guilty plea.

{¶19} Ohio Crim. R. 32.1 governs the withdrawal of a plea of guilty, and provides:

{¶10} “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.”

{¶11} A Criminal Rule 32.1 motion is “addressed to the sound discretion of the trial court, and the good faith, credibility, and weight of the movant’s assertions in support of the motion are matters to be resolved by the trial court.” *State v. Reed*, 7th Dist. No. 04 MA 236, 2005-Ohio-2925, ¶ 7, citing *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph two of the syllabus. Notably, a post-sentence withdrawal of a guilty plea is only available in “extraordinary cases.” *Smith*, 49 Ohio St.2d at 264, 361 N.E.2d 1324. An abuse of discretion implies the trial court’s judgment was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶12} In the case sub judice, Appellant moved the trial court to withdraw her guilty plea well after the trial court imposed her sentence. Accordingly, the burden of

demonstrating manifest injustice lies with Appellant, and the remedy is provided only in extraordinary cases. *State v. Smith* (1977), *supra*.

{¶13} During the change of plea hearing, the following dialogue occurred between Appellant and the trial court:

{¶14} “The Court: All right. Mr. Bishop [Prosecutor], I understand that the drug trafficking case, 06CR372, you intend to dismiss if you get a guilty plea to the three counts of receiving stolen property in the other case at 07CR481. Is that right?

{¶15} “Mr. Bishop: That is correct, Your Honor.

{¶16} “The Court: I further understand that you will be recommending a sentence of two years in prison consecutive to her current sentence. Is that right?

{¶17} “Mr. Bishop: Yes.

{¶18} “* * *

{¶19} “The Court: All right. Do you understand what it is you are accused of, Ms. Bays, what the stolen property is?

{¶20} “The Defendant: Yes.

{¶21} “The Court: Each of those are fifth degree felonies. A fifth degree felony carries a maximum sentence of one year in prison and a \$2500 fine. Consequently, the maximum sentence you could receive is three years in prison and a \$7500 fine.

{¶22} “* * *

{¶23} “The Court: So that is the maximum sentence you could receive. Do you understand the maximum sentence could you receive?

{¶24} “The Defendant: Yes, sir.

{¶25} “The Court: The sentence you will receive if you plead guilty is two years in prison, eight months on each count. So, if you do plead guilty, I will be sentencing you to two years consecutive to whatever other time you are serving. Do you understand the sentence you will receive if you plead guilty?”

{¶26} “The Defendant: Yes.

{¶27} “* * *

{¶28} “The Court: Now, Ms. Bays, has anyone told you anything to get you to plead guilty other than what I told you here in the courtroom?”

{¶29} “The Defendant: No, sir.

{¶30} “* * *

{¶31} Transcript, Change of Plea Hearing, Oct. 17, 2007 at 4-6.

{¶32} First, we find Appellant could have raised the issue raised herein on direct appeal after her sentence was initially imposed. Appellant did not file an appeal; therefore, the issue is barred by the doctrine of res judicata. Assuming, arguendo, the issue is not barred, we find there was no prejudicial violation of the plea bargain. As set forth, supra, Appellant repeatedly agreed and repeatedly stated she understood the sentence she would receive if she entered a guilty plea and the sentence fell within the range the State originally agreed to recommend. No manifest injustice occurred.

{¶33} Appellant also alleges a claim of ineffective assistance of counsel regarding her change of plea. The standard of review of an ineffective assistance of counsel claim is well-established. Pursuant to *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 673, in order to prevail on such a claim, the appellant must demonstrate both (1) deficient performance, and (2) resulting

prejudice, i.e., errors on the part of counsel of a nature so serious that there exists a reasonable probability that, in the absence of those errors, the result of the trial court would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373; *State v. Combs*, supra.

{¶34} In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley*, 42 Ohio St.3d at 142, 538 N.E.2d 373. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists that counsel's conduct fell within the wide range of reasonable, professional assistance. *Id.*

{¶35} In order to warrant a reversal, the appellant must additionally show she was prejudiced by counsel's ineffectiveness. This requires a showing that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Bradley*, supra at syllabus paragraph three. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

{¶36} Appellant's claim of ineffectiveness is based upon trial counsel's failure to object to the State inaccurately describing the plea agreement to the trial court. Assuming, arguendo, trial counsel's representation fell below an objective standard of reasonableness, we find Appellant is unable to establish she was prejudiced thereby. As noted supra, the trial court sentenced Appellant within the recommended range and Appellant voluntarily entered her plea after being advised the trial court intended to sentence her to 24 months in prison.

{¶37} Appellant's sole assignment of error is overruled.

By: Hoffman, J.

Edwards, P.J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

DEANA BAYS

Defendant-Appellant

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JUDGMENT ENTRY

Case No. 09 CA 0099

For the reasons stated in our accompanying Opinion, the judgment of the
Richland County Common Pleas Court is affirmed. Costs assessed to Appellant.

s/ William B. Hoffman

HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards

HON. JULIE A. EDWARDS

s/ Patricia A. Delaney

HON. PATRICIA A. DELANEY