[Cite as *State v. Rittner*, 2005-Ohio-6526.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
FULTON COUNTY

State of Ohio — Court of Appeals No. F-05-003

Appellee — Trial Court No. 92-CR-118

v.

Daniel L. Rittner, Sr. — **DECISION AND JUDGMENT ENTRY**

Appellant — Decided: December 9, 2005

* * * * *

Roger D. Nagel, Fulton County Prosecuting Attorney, for appellee.

Daniel L. Rittner, Sr., pro se.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Fulton County Court of Common Pleas which, in relevant part, denied the motions of pro se defendant-appellant, Daniel Rittner, Sr., to withdraw his guilty plea and for a new trial. Appellant now challenges that judgment through the following assignments of error:

{¶ 2} "Error Number I:

{¶ 3} "Did withdraw [sic] of motion to dismiss due to prosecutorial misconduct prejudice the case?

{¶ 4} "Error Number II:

{¶ 5} "Did prosecutor perjure himself in claim of not withholding exculpable evidence?

{¶ 6} "Error Number III:

{¶ 7} "Counsel's failure to move for discovery prejudiced case.

{¶ 8} "Error Number IV:

{¶ 9} "Sufficency [sic] of weight of the evidence does not support the expert's findings.

{¶ 10} "Error Number V:

{¶ 11} "The naming of the trial judge in the 42 U.S.C. §1983 civil action prejudiced the appellant.

{¶ 12} "Error Number VI:

{¶ 13} "Why did trial judge hear false evidence outside the proceedigns [sic] and did said evidence prejudice the case?

{¶ 14} "Error Number VII:

{¶ 15} "Trial counsel failed to call any witness to refute or prove the facts of prosecutorial misconduct, verasity [sic] of the victim's testimony, the competency of the appellant, and to support the facts of appellant's testimony.

{¶ 16} "Error Number VIII:

{¶ 17} "Trial court committed 'plain error' by allowing counsel to withdraw all evidentiary motions in evidentiary hearings.

{¶ 18} "Error Number IX:

{¶ 19} "The question of whether *Blakely v. Washington, Bruce* and other related cases are applicable to the case sub judice."

{¶ 20} On January 22, 1993, appellant entered a guilty plea to two counts of rape, in violation of R.C. 2907.02(A)(1)(b), first degree felonies. Appellant was sentenced to two concurrent terms of 6 to 25 years incarceration, with 6 years of actual incarceration. Appellant did not appeal his conviction and sentence.

{¶ 21} On October 3, 2002, appellant filed a motion to withdraw his guilty plea and a request for an evidentiary hearing pursuant to Crim.R. 32.1. In support of his motion, appellant asserted that he was mentally incompetent at the time of his plea and, therefore, the plea was involuntary. He further asserted that his trial counsel never raised the issue of his competency during the trial court proceedings. In opposition, the state argued that appellant's motion was, in substance, a postconviction petition that was untimely filed because it was filed after the expiration of the 180 day time period prescribed in R.C. 2953.21. The state further argued that because the motion was a petition for postconviction relief, it was barred by the doctrine of res judicata.

{¶ 22} In its decision and judgment entry of November 20, 2002, the trial court denied appellant's motion to withdraw his guilty plea, as well as other various motions. The court summarily denied appellant's motion to withdraw his guilty plea after accepting the state's arguments that the motion was an untimely petition for postconviction relief and was barred by the doctrine of res judicata. Appellant appealed

that ruling to this court. In our decision and judgment entry of September 30, 2003, we noted that the postconviction procedures set forth in R.C. 2953.21 and 2953.23 do not govern a post sentence motion to withdraw a guilty plea under Crim.R. 32.1. *State v. Rittner*, 6th Dist. No. F-02-034, 2003-Ohio-5201, ¶ 15 ("*Rittner I*"). We therefore determined that the trial court erred in summarily ruling against appellant's motion without ruling on the merits, and remanded the case to the trial court for that court to rule on the merits of appellant's motion to withdraw his guilty plea. In *Rittner I*, however, appellant also raised numerous other issues which we reviewed and rejected. In particular, we found that the trial court had jurisdiction over appellant at the time of his conviction; that appellant's trial counsel was not ineffective for failing to discover appellant's severe mental illness and failing to investigate appellant's social and medical background where neither appellant nor his family revealed such information to his trial counsel; that the trial court did not err in failing to hold a competency hearing at the time of the initial trial; and that because a defendant is presumed competent to stand trial and because the record contains no evidence that appellant was incompetent, the trial court did not err in allowing appellant to waive his constitutional rights.

{¶ 23} Subsequently, on remand, the lower court appointed counsel to represent appellant and ordered appellant to undergo a competency evaluation and determination. On January 30 and February 13, 2004, appellant underwent psychological testing and evaluation by Gregory Forgac, Ph.D., a clinical psychologist, to determine his competence to stand trial and to determine his mental state at the time of the offenses.

Then, on December 27, 2004, the lower court held a hearing on the appellant's motions to withdraw his guilty plea and for a new trial. The reports of Dr. Forgac were admitted into evidence and appellant testified about his lengthy history of mental illness. Appellant stated that at the time that the offenses were allegedly committed by him, in 1989 and 1992, he was under the influence of a number of psychotropic medications which had been prescribed to treat his "schizophrenia, psychoses, etcetera." Appellant described his mental state at that time as being "spaced out," stated that he had no idea what time of day it was, believed that his sons were his brothers and that his wife was his mother, and stated that he suffered from seizures. After his incarceration, through treatment and therapy, he was withdrawn from the medication and began to understand his previously debilitated state of mind. Appellant therefore testified that his prior plea was not knowing and voluntary and asked that it be withdrawn.

{¶ 24} Dr. Forgac's reports went into great detail regarding appellant's history of mental illness. Dr. Forgac then summarized his findings as follows:

{¶ 25} "Daniel Rittner, Sr., is a 53-year-old male who has a longstanding history of mental illness dating back to the early 1970s. At the time of these offenses it appears this man was suffering from a severe mental disease in the form of a Bipolar Disorder, Major Depression, Schizoaffective Disorder, Schizoid Personality Disorder, Paranoid Personality Disorder or a combination of these disorders. There are numerous psychiatric hospitalizations and ongoing psychiatric treatment to confirm the presence of a severe mental disease. Nonetheless, the nature of the offenses and the description by the alleged

victims of the events which took place indicate purposeful behavior which Mr. Rittner made an effort to conceal, thereby indicating his knowledge of the wrongfulness of his acts. It also appears this man was able to refrain from committing the acts involved in count three but did not do so. It certainly appears that although this man's behavior at the time of these offenses was not totally a product of his mental illness or severe mental disease, that his mental illness did to some extent play a role in the commission of these acts. It certainly appears Mr. Rittner was in a state of diminished capacity at the time of these offenses. * * * Although Mr. Rittner did appear to be suffering from a severe mental disease at the time of these offenses, it appears his condition was variable and at the time of these offenses he was able to know the wrongfulness of his acts."

{¶ 26} Upon consideration of appellant's testimony, Dr. Forgac's reports, the court's own in camera review of the records of the Department of Job and Family Services, and its own recollection of appellant's demeanor at his plea and sentencing proceedings, the lower court rejected appellant's contention that he was incompetent at the time of the plea and therefore denied appellant's motions to withdraw his guilty plea and for a new trial. It is from that judgment that appellant now appeals.

{¶ 27} Appellant's assignments of error are intertwined and often indecipherable. We do, however, derive the following arguments from appellant's brief. Substantively, appellant asserts that the lower court erred in denying his motions for a new trial and to set aside his guilty plea and that his counsel in the proceeding below was ineffective.

{¶ 28} A motion to withdraw a guilty plea is governed by Crim.R. 32.1 which provides: "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." What constitutes "manifest injustice" has been "variously defined, but it is clear that under such standard, a postsentence withdrawal motion is allowable only in extraordinary cases." *State v. Smith* (1977), 49 Ohio St.2d 261, 264. Whether the movant has demonstrated a manifest injustice is addressed to the sound discretion of the trial court. Id. at paragraph two of the syllabus. Therefore, an appellate court will not reverse a trial court's denial of a motion to withdraw a guilty plea absent an abuse of discretion. *State v. Nathan* (1995), 99 Ohio App.3d 722, 725. An abuse of discretion connotes more than an error of law or judgment; it implies that the action of the trial court was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Finally, while there is no explicit time limit on the filing of a motion to withdraw a plea, "an undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of a motion under Crim.R. 32.1 is a factor adversely affecting the credibility of the movant and militating against the granting of the motion." *Smith* supra at paragraph three of the syllabus.

{¶ 29} In his motion to withdraw his guilty plea, filed in the court below, appellant alleged that the trial court was never informed of his long history of mental health problems and that his trial counsel failed to raise the issue of appellant's competency

before allowing appellant to plead guilty. Appellant further asserted that he did not learn of his mental and physical health problems until recently when he was weaned off of psychotropic medications by a prison counselor and became aware of his diminished mental capacity at the time of his plea. Appellant did not support his motion with any evidentiary material but provided the court with the following list of documents that he stated he would produce at the hearing on his motion.

{¶ 30} "1. The 'AFFIDAVIT (MENTAL ILLNESS)' signed by Michael J. Bumb, Probate Judge, Fulton County Probate Court.

{¶ 31} "2. Defendant's personal mental health file of private psychiatrist.

{¶ 32} "3. 'Case List' file of the defendant's from the Toledo Mental Health Center, Toledo, Ohio.

{¶ 33} "4. 'Case Log' of the defendant's from the Maumee Valley Guidance Center, Defiance, Ohio.

{¶ 34} "5. The defendant's academic test scores upon entering prison in 1993.

{¶ 35} "6. The defendant's 'Claim disability statement' (Mental Health Disability) and doctors evaluation questionnaire from the defendant's insurer, Aid Association for Lutherans, Appleton, Wisconsin.

{¶ 36} "7. The defendant's personal medical files.

Appellant stated that these documents were already in his possession. He further asserted that because his prison medical records were not subject to the public records law, he was

refrained from obtaining them without a court order. Appellant, however, did not request such an order.

{¶ 37} When the case proceeded to the hearing on appellant's motion, appellant never produced the documentary evidence which he had stated he would produce. Rather, the only evidence the court had to review was the reports submitted by Dr. Forgac, appellant's own testimony, the court's own in camera review of the records of the Department of Job and Family Services, and the court's own recollection of appellant's demeanor at his plea and sentencing proceedings.

{¶ 38} The competency of a defendant is presumed. The presumption is rebutted only when a preponderance of the evidence shows that due to his present mental condition, the defendant was unable to understand the nature of the proceedings against him and could not assist in his defense. R.C. 2945.37(G); *State v. Swift* (1993), 86 Ohio App.3d 407, 411. "A defendant may be emotionally disturbed or even psychotic and still be capable of understanding the charges against him and of assisting his counsel." *State v. Bock* (1986), 28 Ohio St.3d 108, 110. R.C. 2901.01(A)(14) states "[a] person is 'not guilty by reason of insanity' relative to a charge of an offense only if the person proves * * * that at the time of the commission of the offense, the person did not know, as a result of a severe mental disease or defect, the wrongfulness of the person's acts." Appellant appears to assert that he was both incompetent to enter the guilty pleas and that he was not guilty of the offenses by reason of insanity and, so, his pleas should be set aside.

{¶ 39} Dr. Forgac concluded that, while mentally ill, appellant knew right from wrong at the time of the offenses. Moreover, as we stated in *Rittner I*, nothing in the plea or sentencing transcripts suggests that appellant was incompetent during those proceedings. The lower court engaged appellant in the appropriate Crim.R. 11 colloquy. Appellant's responses to the court's questions showed that he clearly understood the terms of the plea, the potential sentences that he faced, and that by pleading guilty to the offenses he was admitting to his guilt in the offenses. In addition, the lower court fully informed appellant of the constitutional rights he was waiving by entering the guilty pleas. Appellant's responses demonstrated his full understanding of these rights. Moreover, contrary to appellant's assertion that he was "in my happy place" during the plea hearing, his response to the court's questions demonstrates he was cognizant of his surroundings:

{¶ 40} "THE COURT: Have there been any other promises or threats made against you to secure your agreement to enter these pleas this afternoon?

{¶ 41} "MR. RITTNER: Yes, sir.

{¶ 42} "THE COURT: Have there been any other promises made?

{¶ 43} "MR. RITTNER: No; threats.

{¶ 44} "THE COURT: And no threats?

{¶ 45} "MR. RITTNER: Yes.

{¶ 46} "THE COURT: There have been threats?

{¶ 47} "MR. RITTNER: Affirmative on the threats.

{¶ 48} "THE COURT: Excuse me?

{¶ 49} "MR. RITTNER: Affirmative on the threats?

{¶ 50} "THE COURT: Well, what threats have been made against you?

{¶ 51} "MR. RITTNER: The woman whose children I supposedly had contact with has money of mine, $240.00 and refuses to give it up.

{¶ 52} "THE COURT: Well, the State hasn't threatened you in any way, have they?

{¶ 53} "MR. RITTNER: No. Not the State.

{¶ 54} "THE COURT: All right. And you're not saying that the dispute that you have with the mother of this child is in anyway preventing you from exercising your free decision in this case; are you? You're not saying that are you?

{¶ 55} "MR. RITTNER: No, sir.

{¶ 56} "THE COURT: You are doing this of your own free will and accord; is that correct?

{¶ 57} "MR. RITTNER: Yes, sir.

{¶ 58} "THE COURT: And this is your free and voluntary act indeed; is that right?

{¶ 59} "MR. RITTNER: Yes sir."

In addition, appellant responded "No, sir" when asked by the court if he had ingested any drugs or alcohol within the last 24 hours that could affect his judgment and stated that he was in court with a clear mind.

{¶ 60} Upon review of the record, we must conclude that appellant did not meet his burden of establishing manifest injustice and we cannot say that the lower court abused its discretion in denying appellant's motion to set aside his guilty pleas.

{¶ 61} Appellant further asserts that the lower court erred in failing to grant his motion for a new trial under Crim.R. 33. Appellant filed that motion on the ground of newly discovered evidence, Crim.R. 33(A)(6), and on the ground of accident or surprise which ordinary prudence could not have guarded against, Crim.R. 33(A)(3). Again, appellant asserted that he had only recently discovered that he was mentally ill at the time of the initial proceedings. He claimed that in September 2002, he received his medical file from his family physician and discovered that he had a long history of mental illness and that in July 1992 he was undergoing diagnostic testing for memory loss. He asserted that he learned this information through accident and surprise and that it was newly discovered evidence, and, therefore, he was entitled to a new trial.

{¶ 62} Crim.R. 33(A) provides that a new trial may be granted on motion of the defendant for "accident or surprise which ordinary prudence could not have guarded against," Crim.R. 33(A)(3), and "when new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial." Crim.R. 33(A)(6). Paragraph (B) of the rule then reads:

{¶ 63} "Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it

is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall by filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.

{¶ 64} "Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period."

{¶ 65} Accordingly, Crim.R. 33 clearly contemplates that before a trial court can consider a motion for a new trial in a criminal action, the defendant had to have been convicted after a trial to a jury or the bench, at which evidence was presented. A Crim.R. 33 motion for a new trial is not an appropriate filing in a case, such as this, in which the defendant entered a guilty plea. In those cases, the appropriate filing is a Crim.R. 32.1 motion to withdraw the guilty plea, which we have already discussed. Accordingly, the lower court did not err in denying appellant's motion for a new trial.

{¶ 66} We will next address appellant's first, third and seventh assignments of error in which he asserts that his counsel in the proceeding below was ineffective.

{¶ 67} In order for counsel's performance to be deemed ineffective, the burden is on appellant to establish that counsel's performance fell below an objective standard of reasonable representation and prejudiced the defense. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus; *Strickland v. Washington* (1984), 466 U.S. 668. Hence, to determine whether counsel was ineffective, appellant must show that (1) "counsel's performance was deficient," in that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) counsel's "deficient performance prejudiced the defense," in that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland,* supra at 687.

{¶ 68} In Ohio, a properly licensed attorney is presumed competent, *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301. Moreover, there is "'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance * * *.'" *Bradley*, supra at 142, quoting *Strickland* at 689. Additionally, the effective assistance of counsel does not guarantee results. *State v. Longo* (1982), 4 Ohio App.3d 136, 139. "A failure to prevail at trial does not grant an appellant license to appeal the professional judgment and tactics of his trial attorney." *State v. Hart* (1988), 57 Ohio App.3d 4, 10. Moreover, reviewing courts must not use hindsight to second-guess trial strategy, and must keep in mind that different trial counsel will often defend the same case in different manners. See *Strickland* at 689. "Debatable trial tactics generally do not

constitute a deprivation of effective counsel." *State v. Phillips* (1995), 74 Ohio St.3d 72, 85, citing *State v. Clayton* (1980), 62 Ohio St.2d 45, 49.

{¶ 69} Appellant first asserts that his counsel was ineffective for withdrawing the motion to dismiss indictment due to prosecutorial misconduct, which appellant had filed pro se. In that motion, appellant alleged that prosecutors failed to present evidence to the grand jury that in March 1992 the Fulton County Probate Court had committed him to the Toledo Mental Health Center. Appellant contends that this "evidence" was somehow exculpatory and therefore should have been presented to the grand jury. Assuming arguendo that such information was exculpatory, a prosecutor has no duty to present exculpatory evidence to the grand jury. *State v. Ball* (1991), 72 Ohio App.3d 549, 551. Accordingly, appellant's counsel was not ineffective for withdrawing the motion and the first assignment of error is not well-taken.

{¶ 70} Appellant next asserts that his counsel was ineffective in failing to file motions for discovery. Such discovery, appellant contends, would have established prosecutorial misconduct, that the victims fabricated their statements, that the victims had made prior allegations of rape, and that appellant suffered from severe mental illness and memory loss and was addicted to psychotropic drugs at the time of the offenses. We have already dealt with the issue of prosecutorial misconduct and further note that appellant has not established that the outcome of the proceeding would have been different had the grand jury been informed of his commitment to the Toledo Mental Health Center. With regard to statements and allegations allegedly made by the victims,

a defendant is not entitled to withdraw a guilty plea simply because he has decided that he now wants to challenge the credibility of his accuser. *State v. Padgett* (1990), 67 Ohio App.3d 332, 340-341. Finally, regarding appellant's assertions that discovery would have led to evidence of appellant's history of mental health problems, it is clear that that evidence was already before the court in the form of Dr. Forgac's reports. Indeed, the lower court fully recognized appellant's long history of mental health problems. Accordingly, appellant has not established his counsel was ineffective for failing to file motions for discovery regarding the above information and the third assignment of error is not well-taken.

{¶ 71} Finally, appellant asserts that his lower court counsel was ineffective in failing to call any witnesses in the hearing below to prove prosecutorial misconduct, to challenge the veracity of the victims, to support appellant's testimony and on the issue of appellant's competency. The issues of prosecutorial misconduct and veracity of the victims have already been fully addressed above and need not be repeated here. Appellant further contends, however, that his lower court counsel was ineffective for, in particular, failing to call Cheri DePew as a witness at the proceeding below to refute the report of Dr. Forgac and to establish that appellant was incompetent at the time of the offenses. Appellant asserts that Cheri DePew has been his treating psychologist in prison since 1993, and was more able to evaluate appellant's mental state at critical times in his life. Whether or not this statement is true, however, is not a matter that is in the record. Appellant has attached to his brief a copy of a letter that he sent to DePew that contains a

handwritten response that was allegedly written by DePew. That letter, however, is not in the record. "A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." *State v. Ishmail* (1978), 54 Ohio St.2d 402, paragraph one of the syllabus. Moreover, Dr. Forgac's reports are extremely thorough and it is by no means certain that had DePew testified at the proceedings below the outcome would have been different.

{¶ 72} Appellant's next assertion is that he was surrounded by doctors, family, friends, neighbors and government agencies prior to the time of any allegations being made by the victims in this case but that his counsel below failed to call any of these people in support of his motion. At the hearing below, however, appellant himself testified that: "I've tried to contact the individuals and ask them what they knew and what they didn't know, including my brothers, my sisters, my children, any number of people, my doctor, my physicians; and I can't get any response from any of these folks." Accordingly, we cannot say that the outcome of the hearing would have been different had appellant's counsel called these individuals to testify as witnesses at the hearing below. Appellant has not met his burden of establishing ineffective assistance of counsel and the seventh assignment of error is not well-taken.

{¶ 73} In his second assignment of error, appellant asserts that the prosecutor committed perjury by withholding exculpable evidence. The statute prescribing the crime of perjury provides in relevant part: "No person, in any official proceeding, shall knowingly make a false statement under oath or affirmation, or knowingly swear or

affirm the truth of a false statement previously made, when either statement is material." R.C. 2921.11(A). Accordingly, for an allegedly false statement to constitute perjury is must be made under oath or affirmation. Appellant simply lists what he claims is exculpable evidence and claims that the prosecutor withheld such evidence from him. The withholding of allegedly exculpable evidence does not constitute perjury. The second assignment of error is not well-taken.

{¶ 74} In his fourth assignment of error, appellant claims that Dr. Forgac's findings are unsupported by sufficient evidence and are against the manifest weight of the evidence. These standards, however, do not apply to Dr. Forgac's findings. Rather, Dr. Forgac was an expert witness who provided evidence to the lower court to assist the court in ruling on appellant's motion to withdraw his guilty plea. The court was the trier of fact. As such, it was the court's duty to weigh the evidence and judge the credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The fourth assignment of error is not well-taken.

{¶ 75} In his fifth assignment of error, appellant asserts that his naming the trial judge in a civil action prejudiced him. Appellant's argument under his fifth assignment of error reads in its entirety:

{¶ 76} "In Supplement to the brief herein Appellant cites the transcrip [sic] (trans 1-7-04 p.4 1. 5, 'postage'). Medical care (trans. 5-12-04 p.4 L. 10 to p.6 L. 19). Access to the courts (trans 5-12-04 p.5 L. 20 to p. 6 L. 19).

{¶ 77} "Corrections Center of Northwest Ohio denied access to courts and 42 U.S.C. §1983 complaints (Appx p. 1), 'letters to court) (trans 5-12-04 p.10 L. 7 to p. 11, L. 11).

{¶ 78} "The Appellant placed Judge Barber on notice as a defendant to the 1983 complaint as a business partner of CCNO. (Appx. p. 1)."

{¶ 79} We find this argument to be indecipherable . App.R. 16(A)(7) requires appellate briefs to contain "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies." When an appellant fails to comply with this rule, App.R. 12(A)(2) permits us to disregard the assignment of error. In addition, "in cases in the courts of common pleas, the Chief Justice of the Supreme Court of Ohio has exclusive jurisdiction to determine a claim that a trial judge is biased or prejudiced." *State v. DeMastry*, 155 Ohio App.3d 110, 2003-Ohio-5588, ¶ 79. Accordingly, appellant's fifth assignment of error is not well-taken.

{¶ 80} In his sixth assignment of error, appellant contends that the lower court judge heard false evidence outside of the proceedings that prejudiced appellant. Appellant claims to have obtained a report from a private investigator whom he retained that shows Judge Barber regularly discussed this case with his business partner Jim Dennis, the director of the Corrections Center of Northwest Ohio. There is simply no evidence in the record that these discussions took place. Moreover, as stated above, if

appellant believes that Judge Barber was prejudiced against him, he must raise that issue with the Chief Justice of the Supreme Court of Ohio. The sixth assignment of error is not well-taken.

{¶ 81} In his eighth assignment of error, appellant asserts that the lower court committed plain error in allowing appellant's counsel in the proceeding below to withdraw all of the evidentiary motions that previously had been filed pro se by appellant before the court appointed him counsel. Under this assignment of error, appellant rehashes his allegations of ineffective assistance of counsel and asserts that the trial court should have directed appellant's counsel to contact witnesses for the defense. That is not the judge's job. The eighth assignment of error is not well-taken.

{¶ 82} Finally, in his ninth assignment of error, appellant questions whether the United States Supreme Court's decision in *Blakely v. Washington* (2004), 542 U.S. 296, and related cases apply to this case. *Blakely* and the other cases cited by appellant are sentencing cases. Appellant did not challenge his sentence through a direct appeal or through any post conviction proceeding. Accordingly, he cannot now raise the issue before this court. Moreover, this court has consistently held that *Blakely* does not apply to Ohio's sentencing scheme. *State v. Curlis*, 6th Dist. No. WD-04-032, 2005-Ohio-1217. The ninth assignment of error is not well-taken.

{¶ 83} On consideration whereof, the court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Fulton County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant

to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Fulton County.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

William J. Skow, J. _____
CONCUR.
JUDGE