[Cite as *State v. Wallace*, 2012-Ohio-2675.]

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

State of Ohio	Court of Appeals No. WD-11-031
Appellee	Trial Court No. 2011CR0023
v.	
Mark Wallace	**DECISION AND JUDGMENT**
Appellant	Decided: June 15, 2012

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Gwen Howe-Gebers, Assistant Prosecuting Attorney, for appellee.

Brian D. Smith, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Mark Wallace appeals a May 3, 2011 judgment of the Wood County Court of Common Pleas. Under the judgment, appellant stands convicted of (1) theft, a violation of R.C. 2913.02(A)(1) and a felony of the fourth degree, (2) receiving stolen property, a violation of R.C. 2913.51(A) and a felony of the fifth degree, and (3)

engaging in a pattern of corrupt activity, a violation of R.C. 2923.32(A)(1) and a felony of the third degree. The convictions are a result of guilty pleas entered under a plea agreement.

{¶ 2} The court also imposed sentence, sentencing Wallace to serve a one-year term of imprisonment on the conviction for theft, a one-year term on the conviction for receiving stolen property, and a five-year term on the conviction of engaging in corrupt activity. The court ordered that the sentences be served concurrently with each other for a total aggregate term of imprisonment of five years. The trial court also ordered appellant to pay restitution in the amount of $9,548.01.

{¶ 3} On appeal, appellant challenges the trial court judgment on three grounds: (1) that the theft and receiving stolen property convictions and sentences are for allied offenses of similar import under R.C. 2941.25(A) that are to be merged into a single conviction and sentence, (2) that the conviction for theft is barred by double jeopardy because of a prior criminal prosecution against him, and (3) that appellant received ineffective assistance of counsel. Appellant raises these arguments under three assignments of error:

{¶ 4} Assignment of Error No. 1: The Defendant-Appellant's conviction for both theft and receiving stolen property is contrary to law and should be reversed.

{¶ 5} Assignment of Error No. 2: The Defendant-Appellant's conviction for theft is a violation of his Constitutional right against double jeopardy.

{¶ 6} Assignment of Error No. 3: The Defendant-Appellant received ineffective assistance of counsel.

Claimed Allied Offenses

{¶ 7} Under Assignment of Error No. 1, appellant argues that applying the standard set by the Ohio Supreme Court in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, his theft and receiving stolen property convictions are for allied offenses within the meaning of R.C. 2941.25 and that the two convictions were to be merged at sentencing. In *Johnson*, the court identified a two-step analysis to determine allied offenses under R.C. 2941.25(A):

> In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other. * * *.
>
> If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., "a single act, committed with a single state of mind." [*State v.*] *Brown,* 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N. E.2d 149, at ¶ 50 (Lanzinger, J., dissenting.). *Id.*, at ¶ 48-49; see *State v. Harris*, 6th Dist. No. L-10-1171, 2011-Ohio-4863, ¶ 18.

{¶ 8} At the plea hearing, the state made a statement of facts that it contends would be established by the evidence at trial. With respect to the theft count, the state

claimed that the evidence at trial would establish "that on or about March 1st, 2010, and continuing through October 14th, 2010, in Wood County, the defendant, Mark Wallace, did with purpose to deprive Hobby Lobby, the owners of property or services, to wit; art and crafts supplies knowingly obtained or exerted control over said property without the consent of Hobby Lobby valued at $5,000 or more but less than $100,000."

{¶ 9} With respect to the receiving stolen property count, the state contended that the evidence would establish that "on or about April 1st, 2010 and continuing through October 14th, 2010, the defendant in Wood County did knowingly receive, retain or dispose of property of another, knowing or having reasonable cause to believe said property was obtained through the commission of a theft offense, valued at less than $5,000."

{¶ 10} The parties agree that the first step under the *Johnson* analysis has been met; that is, they agree that it is possible to commit both the stolen property offense and the theft offense by the same conduct. Appellant asserts that the second step has also been met, arguing that both offenses were committed by appellant's theft of merchandise from Hobby Lobby alone, either personally or as an accomplice.

{¶ 11} The state argues first that the court should decline to consider the allied offenses argument presented by appellant. Appellant failed to raise the issue in the trial court and the state argues that this court should refuse to consider the issue as plain error on appeal. On the merits, the state argues that the two offenses were not in fact committed by the same conduct. The state contends that the evidence at trial would have

demonstrated that the receiving stolen property conviction was based upon instances where appellant received stolen property but had not been involved in the actual theft, either personally or as an accomplice.

{¶ 12} We have reviewed the record. In our view, even were we to consider appellant's argument on allied offenses as plain error, appellant's argument must fail. The record lacks evidence upon which to determine whether the same conduct resulted in both convictions. On this record, we are unable to determine whether the offenses were in fact committed by the same conduct.

{¶ 13} Accordingly, we find appellant's Assignment of Error No. 1 is not well-taken.

Claimed Bar by Double Jeopardy Due to Prior Prosecution for Theft Offense

{¶ 14} Appellant argues under Assignment of Error No. 2 that his conviction for theft violates state and federal constitutional prohibitions against double jeopardy because he was prosecuted twice for the same theft offense. Appellant basis this argument on a prior prosecution in Perrysburg Municipal Court and attaches documents from that criminal proceeding to his appellate brief as evidence in support of his appeal. The documents, however, were not offered in evidence in the trial court. In fact, the trial court record does not include any documents or record from the municipal court case.

{¶ 15} We cannot consider the municipal court records that were attached to appellant's brief in this appeal. "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*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus. The nature of the appellate process itself precludes consideration of such evidence: "Since a reviewing court can only reverse the judgment of a trial court if it finds error in the proceedings of such court, it follows that a reviewing court should be limited to what transpired in the trial court as reflected by the record made of the proceedings." *Id.* at 405-406.

{¶ 16} As with Assignment of Error No. 1, we conclude that even were we to consider the double jeopardy claim under Assignment of Error No. 2 as plain error, evidence in the record is lacking to support the claim. Accordingly, Assignment of Error No. 2 is not well-taken.

Ineffective Assistance of Counsel

{¶ 17} Under Assignment of Error No. 3, appellant argues that he was denied effective assistance of trial counsel. Appellant argues that his trial counsel was deficient on multiple grounds. First, appellant contends that counsel failed to present and preserve the double jeopardy defense arising from the prior municipal court proceedings (appellant's argument under Assignment of Error No. 2).

{¶ 18} Appellant's argument in this regard requires consideration of contended facts outside of the record in this appeal. Appellant argues that he was convicted of attempted theft under a no contest plea in Perrysburg Municipal Court in a prior criminal prosecution. According to appellant, the charge was based upon an incident at a Hobby Lobby store in Perrysburg that occurred within the dates of the thefts from Hobby Lobby

in Wood County that constitute the basis of the theft conviction in this case. Appellant argues that trial counsel was deficient in failing to object to the theft conviction on the basis of double jeopardy due to the prior municipal court conviction.

{¶ 19} Appellant also argues that trial counsel was deficient in failing to argue in the trial court objections to the theft and receiving stolen property convictions on the basis that they are allied offenses of similar import as argued under Assignment of Error No. 1.

{¶ 20} Finally, appellant also argues that trial counsel was defective because he failed to conduct a thorough investigation of the charges against appellant in this case and as a result failed to fully advise appellant as to applicable law and legal issues raised considered under Assignments of Error Nos. 1 and 2 before he pled guilty to the offenses. Appellant argues that this deficiency made his guilty pleas less knowing and voluntary. Appellant contends that had he known he could not be convicted and sentenced on some of the charges in this case (as argued under Assignments of Error Nos. 1 and 2), he "might" have proceeded to trial.

{¶ 21} To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Proof of prejudice 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." *Id.* at 694; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus.

{¶ 22} In the context of convictions based upon guilty pleas, the prejudice element generally requires a showing "that there is a reasonable probability that, but the counsel's errors * * * [the defendant] * * * would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart* 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *State v. Xie*, 62 Ohio St.3d 521,524, 584 N.E.2d 715 (1992). A different showing of prejudice applies where the ineffective assistance of counsel claim is based upon a claimed failure of trial counsel to communicate a plea offer before it lapsed. *Missouri v. Frye*, __U.S.__, 132 S.Ct. 1399, 1409-1410, 182 L.Ed.2d 379 (2012).

{¶ 23} A claim of ineffective assistance of counsel that requires consideration of evidence outside the record of trial court proceedings cannot be considered on direct appeal. *State v. Hartman*, 93 Ohio St.3d 274, 299, 754 N.E.2d 1150 (2001); *State v. Carter*, 89 Ohio St.3d 593, 606, 734 N.E.2d 345 (2000).

{¶ 24} Our review of appellant's arguments under Assignments of Error Nos. 1 and 2, demonstrates that proof of those claimed errors requires consideration of evidence outside the record of the trial court proceedings. Accordingly the ineffective assistance of counsel arguments based upon the failure of counsel to present and pursue those

claims in the trial court are also not the type of ineffective assistance of counsel claims that can be considered on direct appeal.

{¶ 25} The final ineffective assistance of counsel argument concerns claimed deficiency of legal representation in plea negotiations. Where it is claimed that counsel was ineffective for failing to conduct a proper investigation of the charges against a defendant and to render appropriate legal advice on whether to accept a plea bargain and plead guilty to an offense, the prejudice requirement recognized in *Hill v. Lockhart* applies and requires a showing that but for trial counsel's errors, the defendant would not have pled guilty. *Missouri v. Frye*, 132 S.Ct. at 1409-1410; *Hill v. Lockhart* at 59-60.

{¶ 26} Here appellant has not claimed that he would not have pled guilty had counsel conducted a proper pretrial investigation of the charges against him and had given appropriate legal advice on available defenses to the charges. Accordingly, under *Hill v. Lockhart* analysis appellant's third claim of ineffective assistance of counsel fails for lack of prejudice.

{¶ 27} Accordingly as two of appellant's claims of ineffective assistance of counsel fail due to the necessity to consider evidence outside of the record and the third fails on the merits due to a lack of prejudice, we find appellant's Assignment of Error No. 3 is not well-taken.

{¶ 28} We conclude that justice has been afforded the party complaining and that appellant has not been denied a fair trial. We affirm the judgment of the Wood County

Court of Common Pleas and order appellant to pay the costs of this appeal pursuant to App.R. 24.

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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE