[Cite as *State v. Favre*, 2012-Ohio-4187.]

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

State of Ohio

Appellee

v.

Nicholas L. Favre

Appellant

Court of Appeals No. E-10-051
E-10-052

Trial Court No. 2005-CR-426
2005-CR-570

DECISION AND JUDGMENT

Decided: September 14, 2012

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Loretta A. Riddle, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶1} This is a consolidated appeal from judgments in two cases in the Erie County Court of Common Pleas. In both cases, the court filed judgment entries resentencing defendant-appellant, Nicholas L. Favre, on multiple counts, following a determination

that appellant had not been properly notified of the postrelease control portion of his sentence at his original sentencing hearing. From that judgment, Favre raises the following assignments of error:

> Assignment of Error No. I.
>
> While it is clear that a court speaks through its journal it is an abuse of discretion by the court and prejudicial to the defendant if that journal entry does not reflect the truth.
>
> Assignment of Error No. II
>
> A plea agreement that requires the state of Ohio to stand "mute" and take "no position" on sentencing is breached, and the defendant is prejudiced, when the state of Ohio unilateraly [sic] prepares a judgment entry with a different sentence on the judgment entry than the oral pronouncement of the sentence in court.
>
> Assignment of Error No. III
>
> The trial court erred by not granting defendant's motion to vacate his sentence and allow him to withdraw his plea based on the court's improper sentence on post release control.
>
> Assignment of Error No. IV
>
> The court erred by not allowing the defendant to withdraw his plea when the plea was not given knowingly, voluntarily and intelligently.

Assignment of Error No. V

The court erred by not having defendant present when the sentence orally pronounced in court was increased by a journal entry months later.

Assignment of Error No. VI

Defendant was prejudiced and had ineffective assistance of counsel when counsel failed to review the sentencing entry to make sure it conformed to the hearing; failed to object to the sentencing entry, failed to object to the state of Ohio not honoring its agreement, failing to properly defend defendant at his subsequent re-sentencing and failed to argue for dismissal of some of the charges based on allied offenses of similar import.

Assignment of Error No. VII

The trial court erred by allowing the state of Ohio to prepare a judgment entry which included the court's deliberative process and not requiring the state of Ohio to serve a copy of the proposed judgment entry prior to the court's signing said judgment entry to the defendant or obtaining the defendant's input.

{¶2} The facts leading to this appeal are as follows. On September 19, 2005, Favre was indicted in Erie County Court of Common Pleas case No. 2005-CR-426 ("case No. 426"), on one count of burglary, two counts of theft, and one count of safecracking. On December 16, 2005, Favre was indicted in Erie County Court of Common Pleas case

No. 2005-CR-570 ("case No. 570"), on four counts of burglary, five counts of theft, one count of felonious assault, one count of aggravated robbery, two counts of aggravated burglary, and two counts of having weapons while under a disability. In addition, firearm specifications were attached to ten of the counts in the indictment. On September 12, 2006, Favre, pursuant to a plea agreement, entered guilty pleas to seven of the nineteen total counts. In case No. 426, Favre pled guilty to one count of burglary. Under the plea agreement, the remaining counts were dismissed and the state agreed to remain mute at the sentencing hearing. In case No. 570, Favre pled guilty to four counts of burglary, one count of felonious assault with a firearm specification, and one count of aggravated burglary with a firearm specification. The remaining counts and specifications were dismissed and, again, the state agreed to remain mute at the sentencing hearing. The written plea agreements in both cases include the statement "After prison release I shall have up to 5 years of Post Release Control." In addition, the written plea agreement in case No. 570 included the statement "I understand the MAXIMUM PRISON/JAIL TERM could be 53 years 0 months of which at least 5 is mandatory."

{¶3} A sentencing hearing on both cases was held on November 28, 2006. In case No. 426, the court imposed a sentence of seven years' incarceration on the one count of burglary. In case No. 570, the court sentenced Favre to seven years on each of the four counts of burglary, seven years for the aggravated burglary count, seven years for the felonious assault count, and three years mandatory minimum on the gun specifications.

The court further ordered all terms to be served concurrently to each other, and concurrently to the term in case No. 426. The court did not address the issue of post-release control.

{¶4} On December 6, 2006, the lower court filed its judgment entry of sentence in both cases. In case No. 426, the written entry imposed the seven year term for the burglary conviction, stated that the sentence is to run concurrently with the sentences imposed in case No. 570, and granted Favre 238 days of credit for time served as of November 28, 2006. The written order, however, also notified Favre that upon serving his sentence he would be supervised for a mandatory period of five years postrelease control. In case No. 570, the written entry reflected the terms of incarceration that the court imposed at the sentencing hearing, seven years concurrent on each count. With regard to the firearm specifications, the court sentenced Favre to three years on each but determined that they should merge. The court also ordered the three-year term on the firearm specification to be served prior to and consecutive to the sentences imposed for the other counts, and ordered the terms imposed in case No. 570 to run concurrently with the term imposed in case No. 426. Again, the written order notified Favre that upon serving his sentences, he would be supervised for a mandatory period of five years postrelease control. Finally, the court granted Favre 206 days of credit for time served as of November 28, 2006, and ordered the Lorain Correctional Institution, where Favre was

to serve his sentence, to credit him with time served from the date of sentencing until reception at that facility.

{¶5} Favre did not appeal his convictions and sentences. Rather, on March 11, 2010, he filed in both cases a pro se "motion to vacate void judgment for lack of post release control and for re-sentencing/motion to compel specific performance of plea agreement/ withdrawal of plea/ motion to strike charges of similar import/ motion to vacate re-sentencing pursuant to Crim.R. 32, Sup.R. [sic] 39." In its response, the state conceded that Favre had not been properly advised of postrelease control at the sentencing hearing and asked that he be returned to court for re-sentencing. The state further argued that while the court should treat Favre's motion to withdraw his guilty plea as a pre-sentence motion and grant him a hearing on that motion, it ultimately should not grant Favre's motion to withdraw his plea as he had not stated a factual basis for a withdrawal. With regard to the other motions filed by Favre, the state asserted that they were without merit.

{¶6} The case proceeded to a hearing on the pending motions and to re-sentence Favre. First, the court addressed Favre's motion to withdraw his guilty pleas. In support of the motion, Favre argued that he should be permitted to withdraw the pleas because the state failed to remain mute at the sentencing hearing, that the court failed to advise him that a term of postrelease control was mandatory, that he was innocent of all charges, that there was unnecessary delay between the time of the plea and sentencing, and that he

should not have been convicted of aggravated burglary with a firearm specification and felonious assault with a firearm specification because they were allied offenses of similar import. Following lengthy arguments on the issues, the court denied the motion to withdraw the guilty plea and proceeded to resentence Favre. In case No. 426, the court again sentenced Favre to seven years on the burglary conviction and properly notified him that upon serving his sentence he would be subject to a mandatory term of postrelease control of three years. In case No. 570, the court again sentenced Favre to seven years on each of the six counts, and ordered those terms to run concurrently. In addition, the court sentenced Favre to three years on each of the two firearm specifications, but determined that those sentences should merge and that the three-year term on the firearm specification should be served prior to and consecutive to the sentences imposed on the other counts, for a total sentence of ten years. In addition, the court ordered that the terms in case No. 570 were to run concurrently to the term in case No. 426. Finally, the court properly notified Favre that upon serving his sentence on Counts 1, 2, 7, 8 and 15, he would be subject to a mandatory period of postrelease control of three years, and that upon serving his sentence on Count 10, aggravated burglary, which was a first degree felony, he would be subject to a mandatory term of postrelease control of five years. On September 14, 2010, the court filed judgment entries reflecting the resentencing in both cases. Favre now challenges those judgments as well as other aspects of his case on appeal.

{¶7} Initially we find that the issues raised in the first and fifth assignments of error directly challenge the trial court's original judgment entries of conviction and sentence, filed by the court on December 6, 2006, and journalized on September 17, 2007 in case No. 426 and on October 1, 2007 in case No. 570. Favre contends that the court erred in journalizing sentencing judgments that did not conform to the sentences entered by the court at the sentencing hearing of December 6, 2006. Favre, however, never appealed those judgments to timely challenge any alleged inconsistencies between the sentences imposed at the hearing and those in the judgment entries. It is well settled that

> Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant * * * on an appeal from that judgment. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus; *see also State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824.

Accordingly, the first and fifth assignments of error are not well-taken.

{¶8} Similarly, under his seventh assignment of error, Favre challenges aspects of his original sentencing entry. Favre contends that following the sentencing hearing of November 28, 2006, the state prepared the judgment entries of sentence and presented

them to the court without any input from the defense. Favre asserts that this amounted to an improper ex parte communication between the state and the court and that the court erred in allowing the state to prepare the entry. Again, because this issue could have been raised in a direct appeal from the original sentencing entries, Favre is foreclosed from raising it in this appeal. The seventh assignment of error is not well-taken.

{¶9} Favre's remaining assignments of error at times appear to challenge the original entry and then directly challenge the trial court's resentencing entry and denial of his motion to withdraw his guilty pleas. Because the trial court's judgments resentencing Favre and denying his motion to withdraw his pleas are the only judgments properly before this court, we will limit our discussion to those issues.

{¶10} In Ohio, jurisprudence surrounding the issue of resentencing requirements when a sentencing court has failed to properly inform an offender of the postrelease control portion of his sentence, was clarified by the Supreme Court of Ohio in *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6283, 942 N.E.2d 332. Prior to *Fischer*, courts followed the pronouncements set forth in *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, and granted a defendant a full de novo sentencing hearing which included the proper imposition of postrelease control. From those resentencing entries, however, offenders regularly challenged on appeal the entire sentence as well as other alleged errors in the trial court proceedings. The court in *Fischer*, however, held that "[t]he new sentencing hearing to which an offender is entitled under *State v. Bezak* is

limited to proper imposition of postrelease control." *Id.*, paragraph two of the syllabus. Accordingly, pursuant to *Fischer*, the trial court has no authority at resentencing to revisit the terms of the original sentence or "do anything other than correctly impose post-release control upon the [defendant]." *State v. Smith*, 9th Dist. No. 10CA009819, 2011-Ohio-398, ¶ 7.

{¶11} In the present case, the trial court did not properly notify Favre of the postrelease control portion of his sentences at the original sentencing hearing of November 28, 2006, although the court did include a mandatory term of five years postrelease control in the judgment entry. Nevertheless, Favre was entitled to a resentencing hearing. The court proceeded to resentence Favre at a hearing on September 14, 2010. The decision in *Fischer* was released on December 23, 2010. Given the timing of the hearing, the court proceeded to resentence Favre under the *Bezak* line of cases, which demanded a de novo hearing. At that hearing, the court properly imposed the five-year term of postrelease control which is a portion of his sentence as a matter of law.

{¶12} Prior to the resentencing portion of the hearing below, the court considered Favre's motion to withdraw his guilty plea. The parties all agreed that the motion was to be considered a presentence, rather than postsentence, motion to withdraw because at the time of the hearing *Bezak* was still controlling. Following *Fischer*, however, this court has held that "motions to withdraw guilty pleas in judgments subject to attack for failure

to comply with statutory requirements for imposition of postrelease control are to be treated as postsentence motions under Crim.R. 32.1." *State v. Beachum*, 6th Dist. Nos. S-10-041 & S-10-042, 2012-Ohio-285, ¶ 21, citing *State v. Gonzalez*, 193 Ohio App.3d 385, 2011-Ohio-1542, 952 N.E.2d 502, ¶ 34 (6th Dist.). Accordingly, we will review the trial court's denial of Favre's motion to withdraw his guilty pleas as a postsentence motion.

{¶13} A postsentence motion to withdraw a guilty plea may only be granted to correct a "manifest injustice." Crim.R. 32.1. A defendant who seeks to withdraw a guilty plea after the imposition of sentence carries the burden of establishing the existence of manifest injustice. *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus. A manifest injustice is defined as a "clear or openly unjust act." *State v. Odoms*, 10th Dist. Nos. 04AP-708 & 04AP-709, 2005-Ohio-4926, ¶ 9, citing *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 699 N.E.2d 83 (1998). Manifest injustice is an extremely high standard, and a defendant may only withdraw his guilty plea in extraordinary cases. *State v. Tabor*, 10th Dist. No. 08AP-1066, 2009-Ohio-2657, ¶ 6, citing *State v. Price*, 4th Dist. No. 07CA47, 2008-Ohio-3583, ¶ 11. *State v. Harmon*, 6th Dist. No. L-10-1195, 2011-Ohio-5035, ¶ 12.

{¶14} The decision to grant or deny a Crim.R. 32.1 motion to withdraw a guilty plea is reviewed on appeal under an abuse of discretion standard. *Harmon* at ¶ 11; *State v. Tunstall*, 2d Dist. No. 23730, 2010-Ohio-4926, ¶ 9. Accordingly, we will not reverse

the trial court's denial of that motion unless we find that the court's attitude in ruling on the motion was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶15} In the proceedings below, Favre cited several grounds in support of his motion to withdraw his guilty pleas: (1) that the state failed to remain mute at the sentencing hearing in violation of the plea agreement, (2) that the court failed to inform him that the postrelease control portion of his sentence was mandatory, (3) that he was innocent of all the charges, (4) that because his original sentence was entirely void, he had never been sentenced at all and the time between his plea and the resentencing amounted to an unnecessary and unconstitutional delay which entitled him to immediate release from prison, and (5) that he was improperly sentenced to aggravated burglary with a gun specification and felonious assault with a gun specification because those were allied offenses of similar import which arose from the same incident.

{¶16} The lower court reviewed Favre's arguments, found them not well-taken and denied his motion to withdraw his guilty plea. The crux of Favre's argument, both before the lower court and on appeal, is that he received a longer sentence than the one he believed the lower court gave him at the sentencing hearing (both as to the prison term and as to postrelease control) and that the state violated the plea agreement by discussing the sentence at the original sentencing hearing. Favre asserts that his pleas were not

knowing, voluntary and intelligent because had he been informed of what the actual sentence was to be, he would not have entered the guilty pleas.

{¶17} At the plea hearing below, the state initially informed the court as to the terms of the plea deal that had been reached by the parties and Favre's counsel agreed that those were the terms. The court then directly addressed Favre:

> COURT: All right. Mr. Favre, you've heard all the plea agreements that have been read into the record. I'm going to ask you some questions now to make sure that you understand what your rights are and what's happening here. If there's anything at all that you don't understand, I want you to stop me. Either I'll explain it to you or give you time to talk to your attorney, okay? You have to –
>
> MR. FAVRE: Yes, ma'am.
>
> * * *
>
> COURT: Your understand when you plead guilty in case 426, you're pleading guilty to a felony of the second degree, Burglary, and you also have two more of those in case 570. Each one of those, let's see, actually you have one, two, three –
>
> MR. BAXTER: I think there's a total of four Burglaries, one –
>
> COURT: Four?
>
> MR. BAXTER: -- Felonious Assault, and an Aggravated Burlgary.

COURT: Right, okay. So each of those Burglaries, felonies of the second degree, carry with them two, three, four, five, six, seven, up to eight years in prison, up to $15,000 in fines. You have one felony of the first degree, which is Aggravated Burglary. That carries, on its own, three, four, five, six, seven, eight, nine, up to ten years in prison, up to $20,000 in fines. Counts 8 and 10 each carry mandatory prison time. Presumption in Counts 1, 2, 7, 8, 10 [sic], and 15, and also that applies to case 426.

Let's see, then you have – I'm sorry, bear with me here. I guess that's it. They're all F2s or F1, right? So you got the mandatory maximum on case 426. On that case you could be facing potentially up to eight years in prison, up to $15,000 in fines.

In case number 2005-CR-570 you could be – on each one of those the total adds up to a potential of 53 years, up to potentially $95,000 in fines. So if you got the maximum on both, consecutive, you'll be facing potentially 61 years in prison, potentially $110,000 in fines; do you understand all of that?

MR. FAVRE: Yes.

* * *

COURT: Understand that after prison release you shall have up to five years of post-release control conditions on you. If you violate the

terms of post-release control, potentially the Parole Board could return you back to prison for up to nine months for each violation of those conditions for up to half of your term; do you understand that?

MR. FAVRE: Yes.

{¶18} The court then reviewed with Favre all of the constitutional rights he was waiving by entering the guilty pleas, and Favre acknowledged that he understood those rights and wished to waive them. Favre then pled guilty in open court to the charges as set forth above, and the court accepted his pleas and found him guilty.

{¶19} When the case proceeded to the sentencing hearing, the parties first reviewed the counts and firearm specifications to which appellant had pled guilty. The court then listened to statements from two of the victims, as well as Favre, Favre's attorney, and Favre's father. The court then sentenced Favre as follows:

COURT: * * * Anyway, it will be the judgment of this Court in case number 2005-CR-426, based on all the factors that I have to consider, as to Count 1, Burglary, that the defendant be sentenced to a term of incarceration of seven years in the custody of the Ohio Department of Corrections.

Case 2005-CR-570, as to Counts 1, 2, 7, 15, all Burglary charges, it will be the judgment of this Court that the defendant be sentenced to a term of incarceration of seven years on each count to be run concurrent to each

other; on Count 8, Felonious Assault, seven years in the custody of the Ohio Department of Corrections; on Count 10, Aggravated Burglary, seven years in the custody of the Ohio Department of Corrections. There will be five years mandatory time on those gun, firearm specs, I believe; is that right?

MR. BAXTER: I think it's three.

COURT: Three years? I thought it was five. I don't have the right book. Let's go off the record for a second.

" * * *

COURT: So, correction, it's three years –

MR. BAXTER: Mandatory.

COURT: Three years mandatory on the gun, on the firearm specs –

MR. BAXTER: Right.

COURT: -- for Counts 8 and 10, both, correct?

MR. BAXTER: Correct.

COURT: And then we had – what did you say about the two years, Kevin?

MR. BAXTER: Well, the two years was simply that he would have to – I mean, when I looked at this, I knew he had to have three – you have to have three years of firearm specification and he has to get sentenced to at

least the minimum of one of these and the minimum minimum [sic] would be two years Burglary.

COURT: Okay.

MR. BAXTER: Because you have to have –

COURT: Okay.

MR. BAXTER: So that's how I got to the five year [sic], but –

COURT: All right, okay. So we have the five years minimum. All the counts will be ordered to be served concurrent to each other.

{¶20} Appellant contends that pursuant to the oral pronouncement of sentence, the court sentenced him to seven years in prison, five of which were mandatory. That is not how we read the above quoted sentence. First, at the hearing at which Favre pled guilty to six second degree felonies and one first degree felony, the court notified him that he was facing a maximum possible sentence of 61 years in prison. Then at the sentencing hearing, the court sentenced Favre to seven years on each felony count and ordered that they run concurrently. Although the discussion at times appears confusing, the five-year term discussed was in regard to the firearm specification attached to the aggravated burglary count. R.C. 2929.14(E)(1)(a) requires that any term imposed for a firearm specification be served prior to and consecutive to any prison term imposed for the underlying felony. That is, a firearm specification term cannot stand on its own. It must be predicated on a term for an underlying offense. In order for the court to impose the

three-year term for the firearm specification in this case, it had to impose at the least a two-year term for the underlying felony.

{¶21} When the court then filed its judgment entry of sentence, the court was clear as to the sentences for the felony offenses (seven years on each offense, to run concurrently) and three years actual incarceration on the firearm specification to be served prior to and consecutive to the sentences imposed on the other counts, "for a total of ten (10) years." Appellant did not appeal that sentence. As we stated in *State v. Matthews*, 6th Dist. No. WD-10-025, 2011-Ohio-1265, ¶ 30, "[t]he fact that a sentence imposed pursuant to a guilty or no contest plea is unexpectedly more severe than anticipated does not present a manifest injustice for which a postsentence Crim.R. 32.1 motion to withdraw a plea is to be granted."

{¶22} Similarly, we do not find that Kevin Baxter's comments to the court regarding the statutorily required sentence for a firearm specification amounted to a violation of the plea agreement. The written plea agreement states "Prosecution will remain mute at sentencing." At the hearing on the plea agreement, Baxter stated "Also, I might add that pursuant to the negotiated plea agreement, at sentencing the State will take no position." It is well-settled that a prosecutor must honor a plea agreement and a breach thereof is a violation of a defendant's due process rights. *See Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). When the state agrees to "take no position" on sentencing, it forfeits its right to comment as to the severity of the

sentence and whether the defendant should be imprisoned. *State v. Hannah*, 6th Dist. No. L-85-189, 1985 WL 4665 (Dec. 20, 1985), citing *United States v. Miller*, 565 F.2d 1273, 1275 (3d Cir.1977). Baxter's comments did not amount to taking a position on sentencing. Rather, he was educating the court on the term that the statute required on the firearm specification.

{¶23} Finally, Favre asserts that his plea was involuntary because he was not apprised of the mandatory nature of the postrelease control portion of his sentence. It is undisputed that the court failed to orally inform Favre at the sentencing hearing that he would be subject to a mandatory five-year term of postrelease control following his prison sentence. The court corrected that error, as it was required to do, at the resentencing. Favre further asserts, however, that had he known that he was required to serve a mandatory five-year term of postrelease control, he would not have pled guilty.

{¶24} Crim.R. 11(C)(2)(a) requires that before a trial court accepts a plea of guilty, the court must substantially comply with the rule and inform the defendant of "the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing." This court has held that a court substantially complies with the statute if "'under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving.'" *State v. Abuhashish*, 6th Dist. No. WD-07-048, 2008-Ohio-3849, ¶ 33, quoting *State v. Nero*,

56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). At both the plea hearing and in the written plea agreement, Favre was notified that he shall have up to five years of postrelease control upon serving his prison sentence. Accordingly, he was notified of the maximum potential penalty, that a period of postrelease control was mandatory and that the period could be as long as five years. Under the totality of the circumstances in this case, we find that the lower court substantially complied with Crim.R. 11(C)(2)(a) in accepting Favre's plea.

{¶25} Additionally, we have recognized that an undue delay between the occurrence of the claimed cause for withdrawal of a guilty plea and the filing of the motion to withdraw "'is a factor adversely affecting the credibility of the movant and militating against the granting of the motion.'" *Beachum*, supra at ¶ 28, quoting *State v. Smith*, 49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1977). In the present case, the original judgment entry of sentence in case No. 570, that was filed by the trial court on December 6, 2006, and journalized on October 1, 2007, expressly states: "Defendant is hereby notified that upon serving his sentence, he shall be supervised after leaving prison for a mandatory period of 5 years of post release control." While we recognize that simply including that statement in the sentencing entry did not make the sentence *Bezak* and *Fischer* compliant, it did put Favre on notice of a discrepancy between the entry and the sentencing hearing. Nevertheless, Favre waited approximately three years after the entry was journalized to file the motion to withdraw his guilty plea.

{¶26} Accordingly, given all the facts and circumstances of this case, we do not find that the lower court abused its discretion in denying Favre's motion to withdraw his guilty pleas. The second, third, and fourth assignments of error are not well-taken.

{¶27} Finally, under his sixth assignment of error, appellant contends that his trial counsel was ineffective for failing to review the sentencing entry to make sure it conformed to the hearing, for failing to object to the sentencing entry, for failing to object to the state of Ohio not honoring its agreement, for failing to properly defend him at his subsequent re-sentencing and for failing to argue for dismissal of some of the charges based on allied offenses of similar import.

{¶28} The standard for determining whether a trial attorney was ineffective requires an appellant to show (1) that the trial attorney made errors so egregious that the trial attorney was not functioning as the "counsel" guaranteed under the Sixth Amendment, and (2) that the deficient performance prejudiced appellant's defense. *Strickland v. Washington*, 466 U.S. 668, 686-687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In essence, an appellant must show that his trial, due to his attorney's ineffectiveness, was so demonstrably unfair that there is a reasonable probability that the result would have been different absent his attorney's deficient performance. *Id.* at 693.

{¶29} Furthermore, a court must be "highly deferential" and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" in reviewing a claim of ineffective assistance of counsel. *Id.* at 689. A

properly licensed attorney in Ohio is presumed to execute his or her duties in an ethical and competent manner. *State v. Hamblin*, 37 Ohio St.3d 153, 155-156, 524 N.E.2d 476 (1988). Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel. *State v. Phillips*, 74 Ohio St.3d 72, 85, 656 N.E.2d 643 (1995). Even if the wisdom of an approach is debatable, "debatable trial tactics" do not constitute ineffective assistance of counsel. *State v. Clayton*, 62 Ohio St.2d 45, 48-49, 402 N.E.2d 1189 (1980). Finally, 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. *Strickland*, *supra*, at 689; *State v. Keenan*, 81 Ohio St.3d 133, 152, 689 N.E.2d 929 (1998).

{¶30} The majority of Favre's arguments raise claims of ineffective assistance of his trial counsel during the original plea and sentencing phases of his case in 2006. Because he failed to raise those issues through a direct appeal, those claims are waived. With regard to his claim that his counsel was ineffective at his re-sentencing/ motion to withdraw hearing, Favre contends that counsel did not remember what had occurred at the original sentencing hearing because she agreed that the original sentence was ten years and that she failed to inquire as to the discrepancy between the time given at the original hearing and in the sentencing entry.

{¶31} As we discussed above, despite the confusing colloquy at the original sentencing hearing, the court imposed seven seven-year terms, to be served concurrently,

along with a consecutive three-year term on the firearm specification. Through numerous arguments to the court at the re-sentencing/ motion to withdraw hearing, counsel attempted to explain to the court where appellant's confusion lay with regard to his sentence. Moreover, counsel attempted to explain to appellant why his understanding of his sentence was incorrect. Counsel was not ineffective in her arguments to the court below or in her representation of appellant.

{¶32} With regard to appellant's assertion that defense counsel never argued for the dismissal of some of the charges based on allied offenses of similar import, it is unclear if he is referring to the original sentencing hearing or to the hearing on his motion for resentencing/ motion to withdraw. To the extent his argument refers to the original hearing, the issue is waived. To the extent his argument refers to the subsequent hearing, the court considered all of the issues raised by appellant, including the allied offenses argument, and rejected them. Counsel was not ineffective in that regard. Accordingly, the sixth assignment of error is not well-taken.

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

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE