[Cite as *State v. Burns*, 2013-Ohio-5913.]

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

State of Ohio — Court of Appeals No. L-11-1316

Appellee — Trial Court No. CR0201002476

v.

Daniel Burns — **DECISION AND JUDGMENT**

Appellant — Decided: December 30, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, David F. Cooper and Kevin A. Pituch, Assistant Prosecuting Attorneys, for appellee.

Karin L. Coble, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Daniel Burns, appeals the judgment of the Lucas County Court of Common Pleas, which denied, without a hearing, his petition for postconviction relief. We affirm.

A. Factual and Procedural Background

{¶ 2} The following facts are taken from our earlier decision in *State v. Burns*, 2012-Ohio-4191, 976 N.E.2d 969, ¶ 2-4 (6th Dist.):

> On August 17, 2010, the Lucas County Grand Jury issued a 25-count indictment against Burns, stemming from his actions as business manager of the Toledo City School District ("the school district") from October 2002 to June 2006. During this period, Burns' actions resulted in the theft of approximately $650,000 from the school district. The indictment charged Burns with one count of engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1), a felony of the first degree, one count of theft in violation of R.C. 2913.02(A)(2) or (3), a felony of the second degree, one count of theft in office in violation of R.C. 2921.41(A)(1) or (2), a felony of the third degree, and 22 counts of tampering with records in violation of R.C. 2913.42(A)(1), all felonies of the third degree.
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> Pursuant to a plea agreement, Burns pleaded guilty under *North Carolina v. Alford* to the count of engaging in a pattern of corrupt activity, the count of theft in office, and one count of tampering with records. In exchange, the remaining counts were dismissed. As part of the agreement, Burns would make restitution on all counts, including those dismissed, in an amount to be determined by the Lucas County Probation Department. Additionally, the state agreed to recommend that any sentence imposed be

ordered to run concurrently to a six-year prison sentence arising from Burns' similar conduct in Cuyahoga County. Following a detailed plea colloquy, the trial court accepted Burns' plea, and the matter was set for sentencing.

At the sentencing hearing, the trial court imposed a ten-year prison term, to run concurrently with the term imposed out of Cuyahoga County. The trial court also ordered restitution in the following amounts: $52,429 to the Toledo Board of Education, $180,613 to McNamara & McNamara Cincinnati Insurance, and $425,386 to CNA Insurance. McNamara & McNamara and CNA Insurance are companies that provided surety bonds to Burns during his employment with the school district as required by R.C. 3319.05. The amounts awarded to them represent their disbursements to the school district following Burns' theft. Notably, no objection to the restitution order was made at the time of sentencing.

{¶ 3} In his delayed appeal from his conviction and sentence, appellant challenged the order of restitution to non-victim third party insurance companies as contrary to law. However, in *Burns*, we noted the distinction between "contrary to law" and "authorized by law," and held that because the order of restitution to non-victim third party insurance companies complied with the applicable mandatory sentencing provisions it was "authorized by law." *Id.* at ¶ 21. Further, we held that appellant agreed to the order of restitution. Specifically, we noted that appellant agreed to pay restitution "to all counts of

the indictment," knowing that the amount would approximate $650,000. *Id.* at ¶ 25. In addition, we noted that although the plea agreement was silent regarding to whom the restitution would be paid, appellant's agreement to pay the full amount in restitution, coupled with his assent at the sentencing hearing after being notified that the majority of the money would be paid to the insurance companies, led to the conclusion that he agreed to the restitution order being paid to the insurance companies. *Id.* at ¶ 32. Thus, because the sentence was "authorized by law" and because appellant agreed to the sentence, we held that it was not appealable pursuant to R.C. 2953.08(D)(1).[1] *Id.* at ¶ 33.

{¶ 4} Also in his delayed appeal, appellant argued that counsel was ineffective for failing to object to the order of restitution at the sentencing hearing. We disagreed. We held that counsel's failure to object, and thereby jeopardize a plea agreement that resulted in the dismissal of 22 felony counts and an agreement that any prison sentence run concurrent to a prison sentence out of Cuyahoga County, was not unreasonable. *Id.* at ¶ 35. Further, we held that appellant's argument that counsel failed to object because he did not know or understand the law regarding restitution at the time of the sentencing hearing was conjecture and insufficient to overcome the presumption of competent

[1] "A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." R.C. 2953.08(D)(1).

representation. *Id.* at ¶ 36. Accordingly, we affirmed appellant's conviction and sentence.[2]

{¶ 5} Shortly before his delayed appeal was allowed, appellant filed a petition for postconviction relief. In that petition, he asserted that trial counsel was ineffective for informing him at the time of his plea that the amount of restitution could be challenged at a later time, thereby giving appellant the impression that his plea was conditioned on his ability to argue that the amount of restitution should be limited to the school district's actual loss. In addition, appellant claimed counsel was ineffective for failing to object to the amount of restitution, and for advising him to stipulate to the amount of restitution at the sentencing hearing. Appellant's petition was supported by an affidavit from trial counsel, in which counsel attested to doing the actions that appellant argued constituted ineffective assistance. Through his petition, appellant requested that his plea and sentence be vacated.

{¶ 6} Subsequently, appellant filed an amended postconviction petition. The amended petition essentially argued the same perceived failures of trial counsel, but included as further support an affidavit from appellant himself. More importantly, the petition no longer requested that appellant's plea be vacated, but instead requested that his "sentence with respect to restitution be vacated, and a new sentencing hearing on the issue of restitution be held."

[2] We, however, did reverse the trial court on the issue of whether restitution could be ordered to be taken from appellant's pension.

{¶ 7} Following briefing by the parties, but without conducting a hearing, the trial court denied appellant's petition. The court examined in detail many of appellant's averments in his affidavit and found that they conflicted with the record from the plea and sentencing hearings. Ultimately, the court found that trial counsel was competent and effective, and also that appellant failed to demonstrate that, but for the alleged errors, there was a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial.

B. Assignment of Error

{¶ 8} Appellant has timely appealed the trial court's judgment, and now assigns one error for our review:

> Assignment of Error One: Trial counsel admitted ineffective assistance in his affidavit, the petition presents substantive grounds for relief, and the trial court abused its discretion in dismissing the petition without a hearing.

II. Analysis

{¶ 9} We review a trial court's decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 for an abuse of discretion. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58. "[A] reviewing court should not overrule the trial court's finding on a petition for postconviction relief that is supported by competent and credible evidence." *Id.*

{¶ 10} The Ohio Supreme Court has held that "a trial court properly denies a defendant's petition for postconviction relief without holding an evidentiary hearing where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief." *State v. Calhoun*, 86 Ohio St.3d 279, 714 N.E.2d 905 (1999), paragraph two of the syllabus. In particular,

> Where ineffective assistance of counsel is alleged in a petition for postconviction relief, the defendant, in order to secure a hearing on his petition, must proffer evidence which, if believed, would establish not only that his trial counsel had substantially violated at least one of a defense attorney's essential duties to his client but also that said violation was prejudicial to the defendant. *State v. Cole*, 2 Ohio St.3d 112, 114, 443 N.E.2d 169 (1982).

{¶ 11} Here, appellant insists that counsel was ineffective for failing to discuss the issue of the restitution payees, for failing to inform appellant that restitution cannot be ordered to non-victim third parties, for not contesting the state's evidence as to the amount of restitution, and for advising appellant not to object to the payees at sentencing. Appellant's argument can be summarized into five points: (1) he did not know that restitution to the insurance companies was part of the plea agreement because trial counsel failed to so inform him; (2) he did not know that, absent agreement by the defendant, courts cannot order restitution to be paid to non-victim third party insurance

companies because trial counsel failed to so inform him; (3) had he known those two things he would have objected at the sentencing hearing; (4) because of counsel's statements, he was under the false impression that after the sentencing hearing he could still contest that restitution should be limited to the school district's "actual loss;" and (5) therefore, the order of restitution to the insurance companies should be vacated.

{¶ 12} Appellant identifies his affidavit and the affidavit of trial counsel as evidence that supports his claims. Regarding appellant's affidavit, the trial court examined it and found that it contradicted the record. We note that, "[A] trial court should give due deference to affidavits sworn to under oath and filed in support of the petition, but may, in the sound exercise of discretion, judge their credibility in determining whether to accept the affidavits as true statements of fact." *Calhoun* at 284. In assessing the credibility of affidavit testimony, the trial court should consider all relevant factors, including:

> (1) whether the judge reviewing the postconviction relief petition also presided at the trial, (2) whether multiple affidavits contain nearly identical language, or otherwise appear to have been drafted by the same person, (3) whether the affidavits contain or rely on hearsay, (4) whether the affiants are relatives of the petitioner, or otherwise interested in the success of the petitioner's efforts, and (5) whether the affidavits contradict evidence proffered by the defense at trial. *Id.* at 285.

"Moreover, a trial court may find sworn testimony in an affidavit to be contradicted by evidence in the record by the same witness, or to be internally inconsistent, thereby weakening the credibility of that testimony." *Id.*

{¶ 13} Based on these factors, we hold that the trial court did not abuse its discretion in dismissing the credibility of appellant's affidavit. The judge who reviewed appellant's postconviction petition was the same judge that presided over all phases of the case. Thus, she was in the best position to observe the interaction between appellant and trial counsel and therefore assess the credibility of the affidavits. In addition, appellant submitted his own affidavit, and he is clearly interested in the success of his efforts. Finally, the court found three instances pertinent to this appeal where appellant's affidavit was belied by the record.

{¶ 14} First, the court examined appellant's assertions that, "At no time was I advised that, with my plea, I was agreeing to pay the entire claimed amount of restitution for all counts of the indictment," and "Because of the statement on the plea form that restitution would be determined by probation, and because [trial counsel] did not inform me prior to sentencing that, with my plea, I had to agree to a specific amount of restitution for all counts of the indictment, I believed restitution was still subject to negotiation and would be determined after sentencing." The court, however, noted that as part of the plea agreement, appellant agreed to pay restitution as to all counts in an amount to be determined by the Lucas County Probation Department. Further, the court cited the following exchange during the plea hearing:

The Court: But there is also an agreement that you're going to pay restitution on all of the counts, even the ones that you haven't pled guilty to. And do you have any idea roughly what the restitution order is?

State of Ohio: About $650,000.00

The Court: 650,000. Now, the State, if you do not agree to that amount, the State at the sentencing hearing will have to present evidence in order for the Court to order you to pay restitution, but presume that restitution will be ordered and you're looking at somewhere around 650,000 or potentially more or less, but if you do not enter into an agreement as to the amount, the State has to prove that at the sentencing hearing and your lawyer will have an opportunity to challenge that amount. But presume an order will be imposed and so you understand with this plea it could total about 650,000.

State of Ohio: $650,000.

The Court: $650,000. Do you understand that, Mr. Burns?

[Appellant]: Yes, ma'am.

The Court: And knowing that do you maintain your guilty pleas?

[Appellant]: Yes, ma'am.

Therefore, the court concluded that the record was neither ambiguous or unclear that appellant "was entering into a negotiated plea agreement which included the condition that [appellant] agreed to 'pay restitution on all of the counts' and [appellant] should

'presume that restitution will be ordered' and [appellant] was 'looking at somewhere around 650,000 or potentially more or less.'"

{¶ 15} The court next examined appellant's assertion that "I was surprised when, at the sentencing hearing, the trial court stated an exact amount of restitution that included restitution to insurance companies." The court found that based on the record above, appellant should not have been surprised when he was ordered to pay $658,428 in restitution. Further, it found that trial counsel's affidavit rebutted appellant's claims. Specifically, the court cited counsel's statements: "At the time of his sentencing on January 24, 2011, I informed Burns that the state was prepared to put on a witness to testify to the amount of restitution, as determined by the State Auditor's office, and I opined that the Court would likely order the restitution amount sought by the state;" and, "To the best of my recollection, Burns did stipulate to the amount of restitution during his sentencing hearing, and also to the payees of that restitution, including the two insurance companies." The trial court also noted that appellant did not express any confusion or surprise during the plea and sentencing hearings despite the court's repeated inquiry into whether he understood. Moreover, the court offered to allow appellant to withdraw his guilty plea after informing him of the amount of restitution that would be awarded to the insurance companies, but appellant declined.

{¶ 16} Finally, the court considered appellant's statement that "Because of representations by [trial counsel], I believed and understood that any restitution ordered would be subject to the 'actual loss' incurred by Toledo Public Schools." The court

recognized, however, that the term "actual loss" was never used in the plea or sentencing proceedings. Furthermore, the court found that the record established that appellant "clearly knew what the terms were relative to his negotiated plea agreement and the amount of restitution which was agreed to be paid by [appellant] as part of the negotiated plea agreement."

{¶ 17} Based on our review of the record, we conclude that the trial court gave appropriate deference to appellant's affidavit, and did not abuse its discretion in finding appellant's claimed ignorance of any of the details regarding restitution in his plea agreement to be not credible.

{¶ 18} We now turn to whether appellant has provided sufficient operative facts demonstrating substantive grounds for relief that would warrant an evidentiary hearing. To succeed in his petition, appellant must satisfy the familiar two-step process for determining ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, he must show that counsel's performance fell below an objective standard of reasonableness. Then, he must show that a reasonable probability exists that but for counsel's error, the result of the proceedings would have been different. *Id.* at 687-688, 696.

{¶ 19} Addressing the first step, the trial court found that trial counsel provided competent, effective assistance. Appellant, on the other hand, argues that trial counsel admitted in his affidavit that he provided ineffective assistance. We do not agree. Trial counsel makes two sets of statements in his affidavit relevant to this appeal, both of

which are uncontested, and neither of which support a claim of ineffective assistance of counsel.

{¶ 20} First, counsel stated,

> 4. At the time he entered his guilty plea pursuant to North Carolina v. Alford on December 13, 2010, the amount of restitution Burns would owe had neither been determined by the court nor agreed upon by the parties.
>
> 5. During his change of plea hearing, I advised Burns that the issue of restitution would be decided another day and that we would have the opportunity to contest the amount of restitution that would be claimed by the State of Ohio.

Counsel's statements are accurate. At the time of the plea hearing, the exact amount of appellant's theft had not been determined, but appellant was notified that it was estimated to be around $650,000. The Lucas County Probation Department was to determine the final amount, and had appellant found an error in the probation department's calculations, he could have challenged that amount.

{¶ 21} Next, counsel averred,

> 6. At the time of his sentencing on January 24, 2011, I informed Burns that the state was prepared to put on a witness to testify to the amount of restitution, as determined by the State Auditor's office, and I

opined that the Court would likely order the restitution amount sought by the state.

7. I advised Burns during his sentencing hearing to stipulate to the amount of restitution sought by the state of Ohio, as in my view contesting same would have been futile; however, we did not discuss to whom the restitution would be paid.

8. To the best of my recollection, Burns did stipulate to the amount of restitution during his sentencing hearing, and also to the payees of that restitution, including two insurance companies.

Again, counsel's statements describing the posture of the proceedings is accurate. It is uncontested that the state did have a witness from the state auditor's office that would testify to the amount of restitution, and the record indicates that appellant did stipulate to the restitution amounts and payees. In addition, counsel's actions and advice did not constitute ineffective assistance as appellant at no time has argued that the $658,428 figure is an inaccurate representation of the amount he stole. Further, the fact that he did not discuss payees with appellant was not unreasonable because the plea agreement centered on the understanding that appellant would repay the total amount that he stole from the school district in exchange for the dismissal of 22 felony counts and the promise to run his time concurrently to his prison time out of Cuyahoga County. To whom the restitution would be paid was not of consequence until appellant later learned that, absent agreement, the trial court could not order restitution to non-victim third party insurance

companies, and appellant began attempting to back away from his agreement to repay the full $658,428.

{¶ 22} Based on the foregoing, we find that the trial court's determination that trial counsel was "competent and effective and gave adequate assistance to [appellant] during all of the proceedings before the Court," is supported by the record, and is not an abuse of discretion.

{¶ 23} Furthermore, even if we assume that trial counsel's failure to inform appellant on the law regarding restitution to non-victim third parties fell below an objective standard of reasonableness, we agree with the trial court that he has not demonstrated that a reasonable probability exists that but for counsel's error the result would have been different. "In the context of guilty pleas, * * * in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). As the court found, "[appellant] simply ignores the fact that [he] entered into a negotiated plea agreement. * * * What [appellant] is now attempting to do is only vacate one portion of his negotiated plea agreement and maintain in effect the remaining portions of the agreement." The trial court found, and we held in *Burns*, supra, that the plea agreement included a provision that appellant agreed to pay restitution to the insurance companies. Thus, if appellant truly believes that, had he been properly informed of the law regarding restitution payments to non-victim third parties, he would

not have entered into the plea agreement, then the only proper result would be to vacate the plea and put the parties back into the position they were in before the plea agreement.[3] Appellant, however, has demonstrated that he does not desire this result as he amended his petition from seeking vacation of his plea to seeking only vacation of the restitution order. Therefore, appellant has failed to show that he was prejudiced by counsel's alleged error.

{¶ 24} Accordingly, because appellant has failed to present sufficient operative facts that demonstrate substantial grounds for relief, we hold that the trial court did not abuse its discretion in denying appellant's postconviction petition without a hearing. Appellant's assignment of error is not well-taken.

III. Conclusion

{¶ 25} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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[3] In his reply brief, appellant argues that he was not required to seek vacation of his plea because the alleged ineffective assistance occurred at sentencing. As support, he cites *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). However, we find *Gardner* to be inapplicable because in that case the sentence was imposed after the defendant was found guilty by a jury. Here, the restitution order was part of a negotiated plea agreement.

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

Stephen A. Yarbrough, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE