[Cite as *State v. Washington*, 2004-Ohio-7017.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 83867

STATE OF OHIO,	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
vs.	:	AND
BRIAN WASHINGTON,	:	OPINION
Defendant-Appellant	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION		December 23, 2004
	:	
	:	
CHARACTER OF PROCEEDING	:	Criminal appeal from Common Pleas Court
	:	Case No. CR-438452
JUDGMENT	:	SENTENCE VACATED; CASE REMANDED
DATE OF JOURNALIZATION	:	

APPEARANCES:

For Plaintiff-Appellee:

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SEAN C. GALLAGHER, J.:

{¶1} Brian Washington appeals from an order of the trial court that denied his presentence motion to withdraw his guilty plea, and further claims ineffective assistance of counsel. For the reasons outlined below, we vacate the sentence and remand for further proceedings.

{¶2} From the record we glean the following: On October 6, 2003, Washington pleaded guilty to one count of robbery,[1] one count of felonious assault[2] and one count of failure to comply.[3] At the sentencing hearing, but before pronouncing sentence, the following exchange took place:

> **"THE DEFENDANT: Your Honor, I wrote you a letter[4]. I don't know if you've seen it or not.**
>
> **I been thinking about the situation and everything. Your Honor, I don't feel I'm guilty of this crime. I - - I really don't. I never once threatened Mr. McDonough. I never once hurt him or anything. And I don't feel I'm guilty of robbery or felonious assault.**
>
> **You know, I'm not trying to make you mad at me in any kind**

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[1]R.C. 2911.01

[2]R.C. 2903.11

[3]R.C. 2921.331

[4]The letter Washington refers to is not part of the record on appeal.

of way, but I don't feel I'm guilty of this crime.

THE COURT: I see. Well, you've got to understand that, you know, what your attorney here said was that you weren't actively punching the guy, but as long as there's any act of violence in connection with a theft offense, it can become a robbery, which is what this case ultimately became.

Having listed that and treated this as a motion to vacate the plea, the Court is going to deny the same, because I don't see anything. The facts, as explained by your attorney, as I understand them, is it is a robbery. I mean, I've seen purse snatchings where there's a little push; that becomes a robbery. A guy goes in and steals a pack of cigarettes and hits the security guard on the way out. Bam, that's a robbery.

The fact is, Mr. Washington, you were on my paper, my probation, for about two weeks when you picked up the cases. You've got an extensive history."

{¶3} The judge then imposed a sentence of concurrent two-year terms of imprisonment for the robbery and felonious assault, together with a consecutive one-year term for failure to comply. Washington's assignments of error are set forth in the appendix to this opinion.

{¶4} After the sentence was imposed, Washington again expressed concern over whether the judge had permitted him to withdraw his plea.

"THE DEFENDANT: So my motion - - I can't withdraw my plea?

THE COURT: No, sir, I'm denying the motion.

MR. MANNING: Just for the record, he did make the motion to withdraw the plea prior to the sentencing.

THE COURT: He did?

MR. MANNING: I mean, before you sentenced him.

THE COURT: Well, yes, that's absolutely true. But his post plea - - well, it's presentencing. Fine. I know what you're saying."

{¶5} The record reflects that there was no hearing on Washington's attempt to withdraw his guilty plea before sentencing.

"A presentence motion to withdraw a guilty plea should be freely and liberally granted. Nevertheless, it must be recognized that a defendant does not have an absolute right to withdraw a plea prior to sentencing. Therefore, the trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea."[5]

{¶6} We find plain error in the judge's failure to conduct a hearing prior to denying the motion.

{¶7} Washington further claims that he was denied the effective assistance of counsel because he did not adequately understand the nature of the penalty involved when he entered his plea. To prevail, Washington must meet the test for ineffective assistance of counsel established in *Strickland v. Washington,*[6] which was applied to guilty pleas in *Hill v. Lockhart.*[7] First, he must show that his lawyer's performance was deficient,[8] and second that there is a reasonable probability that, but for his lawyer's

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[5]*State v. Xie* (1992), 62 Ohio St.3d 521, 527, 584 N.E.2d 715.

[6](1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

[7](1985), 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203.

[8]*Strickland*, 466 U.S. at 687; *Hill*, 474 U.S. at 57.

errors, he would not have pleaded guilty.[9]

{¶8} Washington does not contend that, but for his lawyer's failure to properly advise him of the nature of the charges, he would not have pleaded guilty, but rather argues that his failure to properly advise him of the maximum or consecutive penalties should he plead guilty, rendered the plea involuntary. The record, however, fails to provide support for the contention that his attorney did or did not advise him about the potential terms of the sentences. We cannot infer his lack of understanding absent sufficient facts in the record.[10] This assignment of error lacks merit.

{¶9} We find Washington's sentence must be vacated and the matter must be remanded for disposition of Washington's motion to withdraw his guilty plea. The court may then proceed to trial or resentence appellant, depending upon whether it grants or denies the motion.

Sentence vacated, case remanded.

APPENDIX A:
ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED IN NOT PERMITTING DEFENDANT-APPELLANT TO WITHDRAW HIS PLEA OF GUILTY PRIOR TO THE

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[9]*Hill*, 474 U.S. at 59.

[10]See *State v. Carter*, 89 Ohio St.3d 593, 606, 2000-Ohio-172, 734 N.E.2d 345.

TIME SENTENCE WAS IMPOSED.

II. DEFENDANT-APPELLANT WAS NOT ACCORDED EFFECTIVE ASSISTANCE OF COUNSEL IN THAT THE SENTENCE WHICH COULD BE IMPOSED UPON HIM WAS NOT PROPERLY EXPLAINED TO HIM PRIOR TO THE TIME HE ENTERED A PLEA OF GUILTY.

This cause is vacated and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, ordered that said appellant recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, J., CONCURS;

ANNE L. KILBANE, P.J.,*

SEAN C. GALLAGHER,
JUDGE

*Judge Anne L. Kilbane participated in this decision prior to her death on November 23, 2004.

(The Ohio Constitution requires the concurrence of at least two judges when rendering a decision of a court of appeals. Therefore, this announcement of decision is in compliance with constitutional requirements. See *State v. Pembaur* (1982), 69 Ohio St.2d 110.)

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E), unless a motion for reconsideration with supporting brief, per App.R. 26(A) is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).