[Cite as *State v. Pulizzi*, 2002-Ohio-2209.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. TIMOTHY M. PULIZZI Appellant	C.A. No. 20729 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 01 05 1106

DECISION AND JOURNAL ENTRY

Dated: May 8, 2002

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BATCHELDER, Judge.

{¶1} Appellant, Timothy M. Pulizzi, appeals his convictions in the Summit County Court of Common Pleas. We affirm in part and reverse in part.

I.

{¶2} Pursuant to a plea agreement, Mr. Pulizzi pled guilty to two counts of failure to comply with an order or signal of a police officer, in violation of R.C. 2921.331(B), two counts of receiving stolen property, in violation of R.C.

2913.51(A), one count of possession of counterfeit controlled substances, in violation of R.C. 2925.37, one count of illegal use or possession of drug paraphernalia, in violation of R.C. 2925.14(C)(1), and one count of petty theft, in violation of R.C. 2913.02(A)(3). On July 25, 2001, the trial court sentenced Mr. Pulizzi to a term of incarceration of four years on each of the two counts of failure to comply with an order or signal of a police officer, one year on each of the two counts of receiving stolen property, ninety days for illegal use or possession of drug paraphernalia, and one hundred eighty days for petty theft. These sentences were to be served concurrently to one another, but consecutively to the one-year term of imprisonment imposed for possession of a counterfeit controlled substance. Mr. Pulizzi's total sentence, therefore, was five years. This appeal followed.

II.

{¶3} Mr. Pulizzi asserts two assignments of error for review. We will address each in turn.

A.

{¶4} First Assignment of Error

> **{¶5}** THE TRIAL COURT ERRED IN DENYING APPELLANT'S ORAL MOTION TO WITHDRAW HIS GUILTY PLEA WHERE 1) THE PLEA WAS NOT KNOWINGLY AND INTELLIGENTLY MADE AS IT WAS INDUCED BY MISINFORMATION FROM HIS COUNSEL; 2) SUCH MISINFORMATION FROM COUNSEL DENIED APPELLANT THE EFFECTIVE ASSISTANCE OF COUNSEL BEFORE ENTERING HIS PLEA.

{¶6} Mr. Pulizzi avers that the trial court erred in denying his motion to withdraw his guilty pleas because his pleas were not knowingly and intelligently made, as such pleas were induced by misinformation from his trial counsel. He further argues that he was denied the effective assistance of counsel because his trial counsel misinformed him as to the terms of the plea agreement. We disagree.

{¶7} Freely granting a postsentence motion to withdraw a guilty plea would permit a defendant to test the weight of potential reprisal and later withdraw the plea if an unfavorable sentence was imposed. *State v. Mushrush* (1999), 135 Ohio App.3d 99, 107. Accordingly, pursuant to Crim.R. 32.1, a postsentence motion to withdraw a guilty plea may be granted only to correct manifest injustice. *State v. Xie* (1992), 62 Ohio St.3d 521, 526. "A defendant who seeks to withdraw a plea of guilty after the imposition of sentence has the burden of establishing the existence of manifest injustice." *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus. An appellate court reviews a trial court's denial of a motion to withdraw a guilty plea under an abuse of discretion standard. Id. at paragraph two of the syllabus. An abuse of discretion is more than an error of judgment; it implies a decision that is unreasonable, arbitrary, or unconscionable. *Xie*, 62 Ohio St.3d at 527.

{¶8} To prevail on an ineffective assistance of trial counsel claim in this case, the defendant must meet the test for ineffective assistance of counsel established in *Strickland v. Washington* (1984), 466 U.S. 668, 80 L.Ed.2d 674. Id.

at 524. The defendant must show that his counsel's performance was deficient and that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty. Id., citing *Hill v. Lockhart* (1985), 474 U.S. 52, 57-59, 88 L.Ed.2d 203, and *Strickland,* 466 U.S. at 687. "The key to determining whether counsel was ineffective in this case is whether counsel provided incorrect advice to the defendant, which, in turn, induced the guilty plea[.]" *Mushrush*, 135 Ohio App.3d at 106.

{¶9} In the present case, Mr. Pulizzi has not asserted that the trial court failed to comply with the requirements of Crim.R. 11, but rather, has argued that his guilty pleas were not knowingly and voluntarily made because such pleas were induced by his trial counsel misinforming him that the trial court had agreed to sentence him to no more than two years if he pled guilty. He further asserts that he was denied the effective assistance of counsel because his counsel so misinformed him. These arguments are without merit.

{¶10} At the plea hearing held on June 22, 2001, the trial court took great care to ensure that Mr. Pulizzi realized that the court had made no promises as to the sentence to be imposed and that no one, including defense counsel, had the authority to make any promises regarding the sentence. At the hearing, after the trial court asked Mr. Pulizzi whether anyone had promised him anything in exchange for his guilty pleas, the following colloquy occurred:

> **{¶11}** THE DEFENDANT: There was a statement made to the effect of how much time that I was possibly looking at

> accepting on this plea if I were to accept all these charges of two years. It was suggested that [defense counsel] had talked with [the judge.]
>
> **{¶12}** [DEFENSE COUNSEL]: Your Honor, I just told Mr. Pulizzi that we had spoken with the Court and that Mr. Pulizzi was not going to get hammered by the Court on this matter.
>
> **{¶13}** THE COURT: Well, the facts and circumstances presented to me during the discussions I considered.
>
> **{¶14}** THE DEFENDANT: Okay.
>
> **{¶15}** THE COURT: Part of the reason that I have allowed this count to be amended is because of the circumstances that have been presented by the prosecutor.
>
> **{¶16}** THE DEFENDANT: Okay.
>
> **{¶17}** THE COURT: And I want you to understand that I don't make decisions regarding a sentence until I've actually read the presentence and the victim impact statement. It's not a meaningless statement for me to say that I consider that information. *I don't know what the sentence is going to be here. But I can tell you there is no agreed sentence. I have not said yes I will impose a sentence of two years.*
>
> **{¶18}** THE DEFENDANT: *Right.*
>
> **{¶19}** THE COURT: *Do you understand that?*
>
> **{¶20}** THE DEFENDANT: *Yes, I understand that.*
>
> **{¶21}** THE COURT: Now, I want you to understand as well that once I get the information then I'm going to make an independent judgment as to what the sentence should be. *So nobody can tell you at this point this is going to happen or that's going to happen, or this is not going to happen or that's not going to happen, because there's no way they can deliver on that.*

(Emphasis added.) The trial court then reviewed with Mr. Pulizzi the evidence that would have been presented at trial, advised him of the possible sentences that

each of the counts in the amended indictment carried, and reiterated that the court was not making any promises as to the sentence that it would impose. After being so informed, Mr. Pulizzi expressed the desire to plead guilty and proceed with sentencing. The trial court again cautioned Mr. Pulizzi that he had "not been made a promise about what the sentence will be." Mr. Pulizzi again acknowledged that fact. Subsequently, Mr. Pulizzi pled guilty to the charges in the amended indictment.

{¶22} Approximately one month later at the sentencing hearing, after the trial court had announced that it was imposing a total sentence of five years, Mr. Pulizzi stated that he wanted to rescind his guilty pleas because he was promised a sentence of not more than two years. He related that his attorney had led him to believe that no more than a two-year sentence would be imposed based upon trial counsel's discussions with the judge. He stated that he had informed his counsel that, if the sentence would be more than two years, he wanted to go to trial. Mr. Pulizzi further explained that, during the plea hearing, his counsel told him that the trial court's advisement that no promises had been made as to the sentence did not mean anything and that the judge would adhere to the sentence previously discussed. When asked by Mr. Pulizzi to confirm these discussions, defense counsel stated that he had only informed Mr. Pulizzi that the trial court was considering a two-year sentence.

{¶23} Although Mr. Pulizzi asserted that his counsel told him that the trial court would impose no more than a two-year sentence and that the colloquy at the plea hearing did not mean anything, we cannot find that the trial court abused its discretion in determining that Mr. Pulizzi had failed to establish the existence of manifest injustice regarding his guilty pleas. The record indicates that the trial court painstakingly endeavored to make sure that Mr. Pulizzi understood that the trial court had not promised to impose a sentence of no greater than two years in exchange for his guilty pleas and that no one, including his counsel, had the authority to promise him that a certain sentence would be imposed. Mr. Pulizzi repeatedly acknowledged that he understood these facts. Moreover, Mr. Pulizzi's defense counsel did not confirm Mr. Pulizzi's version of events, instead stating that he had merely informed Mr. Pulizzi that the court had been considering a sentence of no more than two years. Accordingly, after a thorough review of the record, we cannot conclude that Mr. Pulizzi was denied the effective assistance of counsel in entering his guilty pleas and cannot find that the trial court abused its discretion in denying Mr. Pulizzi's motion to withdraw his guilty pleas. Mr. Pulizzi's first assignment of error is overruled.

B.

{¶24} Second Assignment of Error

{¶25} THE TRIAL COURT ERRED IN IMPOSING A SENTENCE OF ONE YEAR ON THE CHARGE OF POSSESSION OF A COUNTERFEIT CONTROLLED SUBSTANCE, R.C. 2925.37, AS THAT OFFENSE IS

CLASSIFIED AS A MISDEMEANOR OF THE FIRST DEGREE, AND FURTHER ERRED IN ORDERING THAT SENTENCE TO RUN CONSECUTIVELY TO ALL OTHER SENTENCES IMPOSED.

{¶26} In his second assignment of error, Mr. Pulizzi contends that the trial court erred in imposing a one-year prison term for possession of a counterfeit controlled substance, in violation of R.C. 2925.37, as the offense is a misdemeanor of the first degree. He further argues that, as the aforementioned offense is a misdemeanor, the trial court erred in ordering this sentence to run consecutively to all other sentences, in contravention of R.C. 2929.41(A). We agree.

{¶27} In the present case, Mr. Pulizzi was indicted in count three of the indictment for possession of cocaine, in violation of R.C. 2925.11(A), a felony of the fifth degree. At the plea hearing and pursuant to a plea agreement, the State orally moved to amend count three of the indictment to "possession of counterfeit controlled substance, *** a felony of the fifth degree[.]" Mr. Pulizzi pled guilty to such charge. The trial court sentenced Mr. Pulizzi to a one-year term of imprisonment on amended count three, which was to be served consecutively to the other sentences imposed. The trial court's sentence was consistent with a sentence for a fifth-degree felony. See R.C. 2929.14(A)(5). On appeal, Mr. Pulizzi has argued that, because possession of a counterfeit controlled substance is a first-degree misdemeanor, the trial court erred in imposing a prison term greater than six months, see R.C. 2929.21(B)(1), and in ordering this sentence to run consecutively to the other sentences imposed, see R.C. 2929.41(A). We agree.

{¶28} R.C. 2925.37 governs "[o]ffenses involving counterfeit controlled substances[.]" Each division of R.C. 2925.37 proscribes certain conduct involving counterfeit controlled substances, such as possession, trafficking, and aggravated trafficking. Depending on the division, a violation of R.C. 2925.37 ranges from a first-degree misdemeanor to a fourth-degree felony. Significantly, possession of a counterfeit controlled substance is a first-degree misdemeanor. R.C. 2925.37(G).

{¶29} Mr. Pulizzi pled guilty to "possession of counterfeit controlled substance," in violation of R.C. 2925.37. As a guilty plea constitutes a complete admission of guilt as to the charge, Mr. Pulizzi admitted to knowingly possessing a counterfeit controlled substance. See Crim.R. 11(B)(1); see, also, *Shie v. Leonard* (1998), 84 Ohio St.3d 160, 161. Although neither the trial court nor the State specified the division of R.C. 2925.37 with which Mr. Pulizzi was charged,[1] possession of a counterfeit controlled substance is a violation of division (A) of R.C. 2925.37. A violation of R.C. 2925.37(A) is a first-degree misdemeanor. R.C. 2925.37(G). Despite the fact that the State and the trial court referred to possession of counterfeit controlled substance as a fifth-degree felony, Mr. Pulizzi was admitting to the illicit conduct of possessing a counterfeit controlled substance, not to the degree of the offense. We are, therefore, compelled to

[1] During the trial court proceedings and in the judgment and sentencing entries, amended count three was referred to generically as possession of counterfeit controlled substances, a violation of R.C. 2925.37.

conclude that imposing a term in excess of six months for possession of counterfeit controlled substance, a first-degree misdemeanor, was error. See R.C. 2929.21(B)(1)(stating that a prison term for a first-degree misdemeanor shall be for no more than six months). Furthermore, it was error to order the sentence run consecutively to the other sentences imposed. See R.C. 2929.41(A)(stating that a sentence imposed for a misdemeanor conviction must be served concurrently with any felony sentence); see, also, *State v. Butts* (1991), 58 Ohio St.3d 250, syllabus. Accordingly, we remand this case for resentencing on all counts. Mr. Pulizzi's second assignment of error is sustained.

III.

{¶30} Appellant's first assignment of error is overruled. His second assignment of error is sustained. The judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and the cause is remanded for resentencing.

Judgment affirmed in part,
reversed in part,
and cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into

execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to both parties equally.

Exceptions.

WILLIAM G. BATCHELDER
FOR THE COURT

BAIRD, P. J.
WHITMORE, J.
CONCUR

APPEARANCES:

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