IN THE SUPREME COURT OF OHIO

Martin McMichael,

Appellant,

v.

State of Ohio,

Appellee.

On Appeal From the Franklin County Court of Appeals, Tenth Appellate District

Court of Appeals
Case No. 11AP-1042, 11AP-1043, and 11AP-1044

NOTICE OF APPEAL OF APPELLANT MARTIN McMICHAEL

Martin McMichael #645-878
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Pro se

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COUNSEL FOR APPELLEE

ATTENTION: SUNDAY'S ARE FOR LEGAL WORK ONLY

HOURS
Period #1 7:30am - 10:30am
Period #2 1:00pm - 3:30pm
EVENINGS 6:00 P.M. to 8:00 P.M.

SEPTEMBER 2012

Library schedule

THE SCHEDULE HAS CHANGED

North Units: 1, 2, 3, & 4

South Units: LEVEL 2'S & 3'S

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
2 LEGAL 1:00 4 HOUSE 2:15 LEGAL 1 - 2H & 3H 6A 6-6:25 Close inmates 6:25 - 6:55 Medium Inmate 7 PM - Close	**3** North *LABOR DAY* *UNIT* **LIBRARY**	**4** South 7:30 - 10:30am Medium inmate 1:00 - 3:30pm *UNIT* **LIBRARY**	**5** North 7:30 - 10:30am 4 HOUSE :00 - 3:30pm 1 - 2H & 3H	**6** South 7:30 - 10:30am Medium inmate 1:00 - 3:30pm Close inmates	**7** *UNIT* **LIBRARY**	**8** *UNIT* **LIBRARY**
9 LEGAL 1:00 4 HOUSE 2:15 LEGAL 1 - 2H & 3H 6A 6-6:25 Close inmates 6:25 - 6:55 Medium Inmates 7 PM - Close	**10** North AFTERNOON 1:00 pm 4 HOUSE EVENING 6:00 - 8:00pm 1 - 2H & 3H	**11** South 7:30 - 10:30am Medium inmate 1:00 - 3:30pm Close inmates	**12** North 7:30 - 10:30am 1 - 2H & 3H :00 - 3:30pm 4 HOUSE	**13** South 7:30 - 10:30am Medium inmate 1:00 - 3:30pm Close inmates	**14** *UNIT* **LIBRARY**	**15** *UNIT* **LIBRARY**
16 LEGAL 1:00 4 HOUSE 2:15 LEGAL 1 - 2H & 3H 6A 6-6:25 Close inmates 6:25 - 6:55 Medium Inmates 7 PM - Close	**17** North AFTERNOON 1:00 pm 1 - 2H & 3H EVENING 6:00 - 8:00pm 4 HOUSE	**18** South 7:30 - 10:30am Medium inmate 1:00 - 3:30pm Close inmates	**19** North 7:30 - 10:30am 4 HOUSE :00 - 3:30pm 1 - 2H & 3H	**20** South 7:30 - 10:30am Medium inmate 1:00 - 3:30pm Close inmates	**21** *UNIT* **LIBRARY**	**22** *UNIT* **LIBRARY**
23 LEGAL 1:00 4 HOUSE 2:15 LEGAL 1 - 2H & 3H 6A 6-6:25 Close inmates 6:25 - 6:55 Medium Inmates 7 PM - Close	**24** North AFTERNOON 1:00 pm 4 HOUSE EVENING 6:00 - 8:00pm 1 - 2H & 3H	**25** South 7:30 - 10:30am Medium inmate 1:00 - 3:30pm Close inmates	**26** North 7:30 - 10:30am 1 - 2H & 3H :00 - 3:30pm 4 HOUSE	**27** South 7:30 - 10:30am Medium inmate 1:00 - 3:30pm Close inmates	**28** *UNIT* **LIBRARY**	**29** *UNIT* **LIBRARY**
30 LEGAL 1:00 4 HOU 4 HOU 2:15 LEGAL 1 - 2H & 3H 6A 6-6:25 Close inmates 6:25 - 6:55 Medium Inmates 7 PM - Close	**31** North AFTERNOON 1:00 pm 1 - 2H & 3H EVENING 6:00 - 8:00pm 4 HOUSE	**1** South 7:30 - 10:30am Medium inmate 1:00 - 3:30pm Close inmates OCTOBER	**2** North 7:30 - 10:30am 4 HOUSE 1:00 - 3:30pm 1 - 2H & 3H	**3** South 7:30 - 10:30am Medium inmate 1:00 - 3:30pm Close inmates	**4** *UNIT* **LIBRARY**	**5** *UNIT* **LIBRARY**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 11AP-1042 (C.P.C. No. 09CR-5033)
v.	:	No. 11AP-1043 (C.P.C. No. 10CR-1732)
Martin McMichael,	:	No. 11AP-1044 (C.P.C. No. 10CR-3934)
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on July 12, 2012

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher,* for appellee.

Martin McMichael, pro se.

APPEALS from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶ 1} Defendant-appellant, Martin McMichael, appeals from judgments of the Franklin County Court of Common Pleas sentencing him to a seven-year prison term for aggravated robbery with a firearm specification and denying his post-sentence motions to withdraw his guilty pleas and to vacate his sentences. Because the trial court properly denied defendant's motions to withdraw his guilty pleas and to vacate or set aside his sentences, we affirm.

I. Facts and Procedural History

{¶ 2} Defendant's appeal arises from three separate criminal indictments charging a total of 13 counts, consolidated for trial in the trial court. In case No. 09CR-

5033, 11AP-1042 on appeal, the Franklin County Grand Jury issued a seven-count indictment on August 21, 2009 based on an April 15, 2009 incident. The indictment charged defendant with six offenses: one count each of aggravated robbery and kidnapping, first-degree felonies, one count of robbery, a second-degree felony, one count each of robbery and tampering with evidence, and two counts of having a weapon under disability, all third-degree felonies. The aggravated robbery, kidnapping, and robbery charges carried firearm specifications.

{¶ 3} In case No. 10CR-1732, 11AP-1043 on appeal, the Franklin County Grand Jury issued a two-count indictment on March 22, 2010, charging defendant with having a weapon under disability, a third-degree felony, and possession of cocaine with a firearm specification, a fifth-degree felony. The charges arose out of an incident on March 16, 2009.

{¶ 4} In case No. 10CR-3934, 11AP-1044 on appeal, the Franklin County Grand Jury issued a four-count indictment against defendant on July 6, 2010, charging him with having a weapon under disability, a third-degree felony, possession of cocaine, a fourth-degree felony, and trafficking in cocaine and aggravated possession of drugs, both fifth-degree felonies, based on incidents occurring on January 5 and 6, 2010. The possession and aggravated possession charges carried firearm specifications.

{¶ 5} On November 30, 2010, defendant appeared in court with counsel and entered guilty pleas to aggravated robbery with a firearm specification in case No. 09CR-5033, having a weapon while under disability in case No. 10CR-1732, and trafficking in cocaine and aggravated possession of cocaine in case No. 10CR-3934. In return, the state agreed to dismiss the remaining nine charges.

{¶ 6} After the court ordered and received a presentence investigation, the court conducted a sentencing hearing. In case No. 09CR-5033, the court sentenced defendant to four years for aggravated robbery and three years for the firearm specification, to be served consecutively, for a prison term of seven years. In case No. 10CR-1732, the court sentenced defendant to three years for having a weapon while under disability, and in case No. 10CR-3934, the court sentenced defendant to one year each for trafficking in cocaine and possession of cocaine. The court ordered the sentences imposed in each case to be served concurrently, for an aggregate prison term of seven years. On February 18,

2011, defendant filed a notice of appeal for all three cases, but the appeals were dismissed when defendant failed to file a brief.

{¶ 7} On May 3, 2011, defendant filed with the trial court motions to withdraw his guilty pleas pursuant to Crim.R. 32.1, for a new trial, for appointment of counsel, and for funds to hire an investigator. To support his motion to withdraw his guilty pleas, defendant asserted his attorneys provided ineffective assistance of counsel, his pleas were not entered knowingly, intelligently, and voluntarily, and he was not guilty of robbery. Attached to the motion to withdraw his guilty pleas were the sworn affidavits of defendant's mother, Benita McMichael, and defendant's co-defendant in the aggravated robbery case, Richard Edwards. On July 18, 2011, while these motions were still pending, defendant filed a motion to vacate or set aside the judgment and sentence, raising the same claims set forth in his earlier motion to withdraw his guilty pleas.

{¶ 8} On November 3, 2011, the trial court issued a decision and entry that considered and denied each of defendant's motions. In response, defendant filed the present appeal.

II. Assignments of Error

{¶ 9} On appeal, defendant assigns three errors:

> Assignment of Error #1
>
> The Trial Court erred by denying Petitioner's motion to withdraw his guilty plea.
>
> Assignment of Error #2
>
> The Trial Court erred and deprived the appellant of due process of law inviolation [sic] of the Fifth, Sixth and the Fourteenth Amendments to the U.S. and Ohio Constitution when it has been a well established matter of law that in a criminal case, a plea must be entered into "knowingly, Intelligently and voluntarily". Furthermore, failure on any of these points renders the enforcement of the plea which is Unconstitutional under both the Ohio State and U.S. Constitutions. State v Engle (1996) 74 Ohio St. 3d 525 - 527, 660 N.E. 2d 450 - 451.

Assignment of Error #3

The Trial Court disregarded the portion of the "purposes and principles of sentencing" as per R.C. 2929.11(B) when it imposed a sentence upon Petitioner that exceeded the sentences of his Co-Defendants.

III. First and Second Assignments of Error - Guilty Pleas

{¶ 10} Because defendant's first two assignments of error set forth related arguments and suffer related deficiencies, we address them jointly. In these assignments of error, defendant contends the trial court abused its discretion in denying his motion to withdraw his guilty pleas because he was not provided the effective assistance of competent counsel, which in turn adversely affected the knowing, intelligent, and voluntary nature of his guilty pleas.

{¶ 11} Generally, Crim.R. 32.1 permits a motion to withdraw a guilty plea "only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." Because defendant filed his motion to withdraw his guilty pleas after sentencing, he was obligated to demonstrate a manifest injustice. "Manifest injustice relates to some fundamental flaw in the proceedings which result[s] in a miscarriage of justice or is inconsistent with the demands of due process." *State v. Williams*, 10th Dist. No. 03AP-1214, 2004-Ohio-6123, ¶ 5.

{¶ 12} The standard "rests upon practical considerations important to the proper administration of justice, and seeks to avoid the possibility of a defendant pleading guilty to test the weight of potential punishment." *State v. Smith*, 49 Ohio St.2d 261, 264 (1977), citing *Kadwell v. United States*, 315 F.2d 667, 670 (9th Cir.1963). To that end, Ohio courts have consistently held that a change of heart does not justify withdrawing a guilty plea, especially where the change of heart is based upon dissatisfaction with the sentence imposed. *State v. Glass*, 10th Dist. No. 04AP-967, 2006-Ohio-229, ¶ 37. *See also State v. Brooks*, 10th Dist. No. 02AP-44, 2002-Ohio-5794, ¶ 51 (stating "[a] defendant's change of heart or mistaken belief about the guilty plea or expected sentence does not constitute a legitimate basis that requires the trial court to permit the defendant to withdraw the guilty plea").

{¶ 13} The good faith, credibility, and weight to be given to a defendant's assertions supporting a motion to withdraw a guilty plea are matters for the trial court. *State v. Smith*, 10th Dist. No. 07AP-985, 2008-Ohio-2802, ¶ 10. Appellate review of a trial court's decision denying a post-sentence motion to withdraw a guilty plea is limited to whether the trial court abused its discretion. *State v. Peterseim*, 68 Ohio App.2d 211 (8th Dist.1980). "Absent an abuse of discretion on the part of the trial court in making the ruling, its decision must be affirmed." *State v. Xie*, 62 Ohio St.3d 521, 527 (1992).

{¶ 14} Here, defendant asserts the trial court abused its discretion in denying his motion to withdraw his guilty plea because his counsel failed both to conduct adequate discovery and to properly advise him of the sentencing realities attached to pleading guilty. Ineffective assistance of counsel can support a claim of manifest injustice to support withdrawal of a guilty plea pursuant to Crim.R. 32.1. *State v. Dalton*, 153 Ohio App.3d 286, 2003-Ohio-3813 (10th Dist.). A defendant seeking to withdraw a guilty plea based on ineffective assistance of counsel must demonstrate: (1) counsel's performance was deficient, and (2) a reasonable probability, but for counsel's errors, the defendant would not have agreed to plead guilty and instead would have insisted on going to trial. *Xie*; *Strickland v. Washington*, 466 U.S. 668 (1984). A guilty plea nonetheless waives the right to assert ineffective assistance of counsel unless the counsel's errors affected the knowing and voluntary nature of the plea. *State v. Hill*, 10th Dist. No. 10AP-634, 2011-Ohio-2869, ¶ 15, citing *State v. Spates*, 64 Ohio St.3d 269, 272 (1992).

{¶ 15} Defendant first contends counsel did not contact his co-defendants in the aggravated robbery case, who were "willing to testify of [sic] his behalf that he had **no prior** intent or knowledge that a robbery offense was to occur." (Emphasis sic.) (Appellant's reply brief, at 4.) Defendant argues that "[w]ith the testimony, counsel would have been able to refute the fact of participation of this crime to this defendant." (Appellant's brief, at 2.) Defendant alternatively theorizes that, had his co-defendants been introduced as witnesses, "the State may have found the testimony detrimental to their case and offered a plea, which did not happen." (Appellant's brief, at 2.)

{¶ 16} Defendant points to the affidavit of co-defendant Richard Edwards to establish counsel's failure to investigate. In his affidavit, Edwards provides a brief description of events on the day of the robbery, when he, defendant, Sunshine Kelly, and

Kenyatta Willoughby drove to get some food. According to Edwards, Willoughby requested they stop by an apartment complex "to give something to someone"; upon returning to the car with another co-defendant, Antwan Pruitt, Willoughby informed the others of the robbery. (R. 85, Defendant's Motion to Vacate or Set Aside Judgment and Sentence, Edwards' affidavit.) Edwards' affidavit suggests defendant was driving, as Edwards attests that Willoughby said to defendant, "Hurry up and go." (Edwards' affidavit.) According to Edwards, he and defendant "were mad at Kenyatta Willoughby for robbing that guy, but we didn't want to get in trouble with the law, so we took off." Edwards further avers that defendant "had no foreknowledge of any awareness of an offense to take place" on the day of the robbery, that defendant "didn't have anything to do with [the robbery], and that his attorney could have asked [Edwards] to testify on [defendant]'s behalf at any time." (Edwards' affidavit.)

{¶ 17} Despite defendant's claim concerning his counsel's failure to investigate matters pertaining to the subject robbery, the trial court record includes a request for discovery that one of defendant's attorneys filed on October 15, 2009. The requested information included copies of written or recorded statements, as well as transcripts, recordings, and summaries of any oral statements, of any party or witness. The record reflects that on July 14, 2010, the state provided defense counsel with a CD containing Edwards' statement; nothing in the record indicates defense counsel failed to examine the interview CD. The record thus suggests defense counsel had the information defendant claims they lacked.

{¶ 18} Moreover, from this record we cannot determine to what extent defense counsel's strategy factored into decisions on defendant's behalf. A reviewing court will presume defense counsel adequately represented his client's interests. *Vaughn v. Maxwell*, 2 Ohio St.2d 299 (1965); *State v. Williams*, 19 Ohio App.2d 234 (11th Dist.1969). The United States Supreme Court in *Strickland* placed the burden of proving ineffective assistance of counsel squarely upon the defendant, holding a reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* at 689, quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955);

see also State v. Hester, 45 Ohio St.2d 71 (1976) (in reviewing a claim of ineffective assistance of counsel, courts should refrain from second-guessing an attorney's trial strategy).

{¶ 19} Here, for example, notably absent from Edwards' affidavit is any indication of the substance of Edwards' prior statements to police and prosecutors, some of which may have been potentially detrimental to defendant. Indeed, in his affidavit, Edwards attests that defendant not only drove his co-defendants away from the scene after learning they had just committed a robbery but did not come forward because he knew he might be implicated in the crime.

{¶ 20} Similarly, defendant's speculation that the prosecution might have offered a plea bargain with more favorable terms had it been aware of Edwards' statements regarding defendant's role in the robbery lacks merit. The record indicates the prosecution already possessed a statement from Edwards and submitted the statement to defense counsel as part of counsel's discovery request. The prosecution then was aware of Edwards' account and was also aware that defendant might attempt to call Edwards as a witness should the matter go to trial.

{¶ 21} Defendant also contends his counsel erred in failing to introduce testimony from two other co-defendants. Defendant, however, does not identify his proposed witnesses by name, stating only that "these three witnesses were the ones who actually committed, and admitted to, committing the crime in which Petitioner is convicted." (Appellant's brief, at 2.) The record suggests defendant refers to Edwards and some combination of Willoughby, Kelly, and Pruitt. For the present purposes, the identities of the proposed witnesses is not crucial because even though he now claims to have "procured the cooperation of his three witnesses," defendant provides no affidavits or other admissible evidence from any co-defendant other than Edwards. (Appellant's brief, at 2.)

{¶ 22} In seeking to withdraw a guilty plea post-sentence, defendant bore the burden of establishing his case based on specific facts either contained in the record or supplied through affidavits attached to the motion. *State v. Orris*, 10th Dist. No. 07AP-390, 2007-Ohio-6499, ¶ 8; *Smith*, 49 Ohio St.2d 261, paragraph one of the syllabus. "Proof of ineffective assistance of counsel must be more than vague speculation." *State v.*

Giles, 10th Dist. No. 08AP-841, 2009-Ohio-2661, ¶ 19. Because defendant did not provide the necessary evidence buttressing his assertions regarding the additional witnesses, no reversible error may be based on the speculative testimony of two other unnamed witnesses. Defendant has not demonstrated his counsel was deficient in failing to elicit their statements.

{¶ 23} Finally, defendant contends counsel's investigatory efforts were deficient because, "due to the testimony that was not discovered by counsel," defendant was "in the dark when it came to his defense." (Appellant's brief, at 2.) Defendant essentially argues that, at the time of his guilty pleas, he lacked a complete understanding of the options available to him or the strength of his case should he choose to forego a plea and proceed to trial. Defendant's earlier motions, however, contradict his present assertions. In his motion to vacate or set aside judgment and sentence, defendant claimed that he "had advised counsel the other co-defendants were willing to state on the record he was innocent." (R. 85, Defendant's Motion to Vacate or Set Aside Judgment and Sentence, 4.) Thus, despite current contentions to the contrary, the record indicates defendant was aware of his co-defendants' purported willingness to testify on his behalf when he chose to plead guilty. Accordingly, the argument that counsel's actions deprived defendant of important information prior to entering his guilty pleas is without merit.

{¶ 24} Neither the record nor the evidence defendant submitted support defendant's contention that defense counsel's performance fell below an objective standard of reasonableness. Because defendant did not establish that his counsel's assistance was ineffective, the issue of whether counsel's actions prejudiced defendant need not be considered. *See State v. Madrigal*, 87 Ohio St.3d 378, 389 (2000), citing *Strickland* at 697 (noting "[a] defendant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other").

{¶ 25} Defendant next argues he entered a guilty plea based on advice from counsel that was "contrary to the law," and his reliance on such advice negated the "voluntariness of the plea." (Emphasis omitted.) (Appellant's reply brief, at 4.) According to defendant, counsel convinced him to plead guilty based upon "the likelihood of a 'program such as C.B.C.F.' " being his sentence. (Appellant's brief, at 3.) Defendant explains that "[t]he only reason the Appellant entered into the agreement was to put this

ordeal behind him and once again return to some sort of normalcy in his life, even if he had to go to a behavior-rehab-program for a 4 1/2 to 6 month period of time." (Appellant's brief, at 3.)

{¶ 26} A defendant's representations to the trial court regarding his plea deserve significant weight when defendant files a motion to withdraw his or her plea. *Westlake v. Barringer*, 8th Dist. No. 73774 (Dec. 24, 1998) (noting a "defendant cannot succeed on a motion to withdraw a plea based on erroneous advice when defendant states that no promises were made in exchange for the plea and when the possibility of jail is explained"); *State v. Lewis*, 4th Dist. No. 08CA10, 2008-Ohio-4888, ¶ 2 (observing the record contradicted a defendant's assertion that his attorneys coerced him into pleading guilty where he told the court at the sentencing hearing he understood the consequences of pleading guilty and his pleas were voluntary).

{¶ 27} The evidence in the record refutes defendant's claim he was coerced to plead guilty and was improperly prepared for, or informed of, the sentencing possibilities resulting from his guilty pleas. Defendant's signed guilty plea form in the aggravated robbery case reveals he was advised, before entering his pleas, of the mandatory three-year prison term attached to the firearm specification and his ineligibility for community control or judicial release until after he served that three-year term. Moreover, all three guilty plea forms, which defendant individually signed, acknowledged he had not been threatened, promised leniency or otherwise coerced or induced into pleading guilty; the plea represented the free and voluntary exercise of his own will and best judgment; and he was satisfied with his counsel. Consistent with those statements, the trial court recalled in its decision denying defendant's motions that "[w]hen defendant entered his pleas, the court asked him whether he discussed the entry of guilty plea forms with his lawyer, understood them, and signed them; he replied that he did. Even so, the court again extensively discussed with defendant the rights he was waiving and the consequences of entering his guilty pleas." (Decision, at 8.)

{¶ 28} The trial court also noted that defendant's behavior after entering his pleas contradicted his claim that defense counsel promised he would receive "4 1/2 to 6 month[s]" of a "behavior-rehab-program." (Appellant's brief, at 3.) In responding to defendant's motion to withdraw his guilty pleas, the trial court recounted that "although

defendant was offered a full and fair opportunity to address the court at his sentencing hearing, he said absolutely nothing about being lead to believe he would be sentenced to CBCF." (Decision, at 4-5.) The court pointed out that, "even if defendant was somehow 'surprised' when he entered his pleas to learn there would not be a jointly recommended sentence, he had six weeks from then until his sentencing hearing to reconsider his decision to plead guilty and to move to withdraw his pleas." (Decision, at 5.)

{¶ 29} Finally, the trial court noted defendant's waiting "more than four months after learning of his sentence to file" his motion weighed heavily against granting his motion because his argument was "entirely based on claims he knew about before sentence was imposed." (Decision, at 5.) Although Crim.R. 32.1 does not prescribe a time limit after sentence is imposed for filing a motion to withdraw a guilty plea, "[a]n undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of a motion under Crim.R. 32.1 is a factor adversely affecting the credibility of the movant and militating against the granting of the motion." *Smith*, 49 Ohio St.2d 261, paragraph three of the syllabus. *See also State v. Haught*, 4th Dist. No. 06CA30, 2007-Ohio-5736, ¶ 16 (noting that, although "the month between appellant's conviction in the case at bar and the filing of her motion to withdraw guilty plea is not excessive, the trial court may have also questioned why appellant did not file her motion sooner if the alleged injustices were so 'manifest' and 'obvious' ").

{¶ 30} The only admissible evidence defendant offered to support his claim that his counsel incompetently advised him is the affidavit of defendant's mother, Benita McMichael. She avers that counsel told her son "it would be best to put all this behind by pleading guilt[y]," and " 'as a first time offender' that C.B.C.F. was likely." (R. 85, Defendant's Motion to Vacate or Set Aside Judgment and Sentence, Benita McMichael Affidavit, at 1.) In response, the state points out the affiant's position as defendant's relative is a relevant factor the trial court could consider in assessing the credibility of an affiant. *See State v. Calhoun*, 86 Ohio St.3d 279, 285-87 (1999); *State v. Mitchell*, 10th Dist. No. 10AP-756, 2011-Ohio-3818, ¶ 37 (observing that the weight to give a relative's statement is rightly left to the trier of fact).

{¶ 31} Even were defendant's mother's affidavit true and defense counsel advised defendant that he should plead guilty and that placement in the C.B.C.F. program was

likely, the statements alone are insufficient to substantiate allegations of ineffective assistance of counsel. Defendant faced 13 charges in the three consolidated cases, so counsel's advising him to accept a plea bargain that dismissed nine of those charges instead of risking trial easily falls within "the wide range of professionally competent assistance" recognized under *Strickland*. *Id.* at 690. Moreover, " 'an attorney's "mere inaccurate prediction of a sentence" does not demonstrate the deficiency component of an ineffective assistance of counsel claim.' " *Glass* at ¶ 34, quoting *United States v. Martinez*, 169 F.3d 1049, 1053 (7th Cir.1999). *See also Wiant v. United States*, No. 2:04-CV-256, 18-19 (S.D.Ohio 2005) (stating that "where an adequate guilty plea hearing has been conducted, an erroneous prediction or assurance by defense counsel regarding the likely sentence does not constitute grounds for invalidating a guilty plea on grounds of ineffective assistance of counsel").

{¶ 32} Although the discrepancy between counsel's alleged prediction and the actual sentence is evident, we note as a final matter that the statement of defendant's mother fails to specify the time period of the subject conversation with defense counsel in which counsel referred to defendant as a "first time offender." (Benita McMichael Affidavit, at 1.) Without contradiction elsewhere, the statement suggests counsel may have mentioned the possibility of C.B.C.F. before defendant was charged with several more crimes in two more cases. When new charges are filed and consolidated with the original case, the state's offered plea will likely change, through no fault of defense counsel.

{¶ 33} The record and the trial court's holding provide no support for defendant's claims that his counsel's advice regarding his guilty pleas amounted to constitutionally inadequate assistance, and we again decline to address the alleged prejudicial effect of counsel's actions. *See Madrigal*. The evidence further supports the trial court's conclusion that appellant entered his guilty pleas voluntarily, with full knowledge and understanding of the consequences of such pleas.

{¶ 34} Defendant acknowledges the trial court's compliance with the requirements of Crim.R. 11 prior to accepting a plea raises a presumption that the plea was voluntary, but defendant challenges the trial court's decision to proceed without an evidentiary hearing on this motion to withdraw his guilty pleas. Defendant argues that without an

evidentiary hearing "the burden of submitting evidence containing operative facts to substantiate the claim is virtually impossible." (Emphasis omitted.) (Appellant's brief, at 3.) A trial court's decision to hold a hearing on a post-sentence motion to withdraw a plea of guilty is discretionary, and a hearing " 'is not required if the facts as alleged by the defendant, and accepted as true by the court, would not require that the guilty plea be withdrawn.' " *State v. Hernandez*, 10th Dist. No. 11AP-202, 2011-Ohio-5407, ¶ 29, quoting *State v. Griffith*, 10th Dist. No. 10AP-94, 2010-Ohio-5556, ¶ 17.

{¶ 35} The evidence defendant offered fails to include sufficient facts to establish a manifest injustice, and the record contradicts defendant's claims regarding the performance of his counsel and the knowing, voluntary, and intelligent nature of his pleas. The trial court was not required to hold an evidentiary hearing on such claims. *See State v. Olouch*, 10th Dist. No. 07AP-45, 2007-Ohio-5560, ¶ 50 (concluding that where the record contradicts a defendant's claims asserted to support a motion to withdraw guilty plea, the trial court is not required to hold an evidentiary hearing); *State v. Moore*, 4th Dist. No. 01CA674, 2002-Ohio-5748, ¶ 18 (determining an evidentiary hearing on a plea withdraw motion is not required if the defendant's allegations are "conclusively and irrefutably contradicted by the record").

{¶ 36} Lastly, defendant argues in his reply brief that the trial court should have accepted his motion to withdraw his guilty pleas because he is "actually innocent of the offense of robbery as charged." (Appellant's reply brief, at 2.) Defendant's contention is not rightly before this court on appeal, as "a counseled plea of guilty to a charge removes the issue of factual guilt from the case." *State v. Beckwith*, 8th Dist. No. 91399, 2009-Ohio-1244, fn. 4, citing *State v. Stumph*, 32 Ohio St.3d 95, 104-05 (1987). Having concluded the trial court did not abuse its discretion in upholding defendant's guilty pleas, we have no cause to re-examine issues those pleas properly resolved. *See State v. Kimpel*, 6th Dist. No. WM-07-008, 2007-Ohio-6129, ¶ 20 (equating an assertion of innocence in a post-sentence motion to withdraw a guilty plea, where defendant had been granted an adequate plea hearing, to a "change of heart").

{¶ 37} Because defendant failed to establish that the trial court abused its discretion in denying his motion to withdraw his guilty pleas, defendant's first and second assignments of error are overruled.

IV. Third Assignment of Error – Purposes and Principles of Sentencing

{¶ 38} Defendant's third assignment of error contends that the trial court disregarded the purposes and principles of sentencing pursuant to R.C. 2929.11(B) when it imposed a prison sentence "that exceeded the sentences of his co-defendants." (Appellant's brief, at 4.) The state responds nothing requires co-defendants receive equal sentences, so that an "individual has no substantive right to a particular sentence within the statutorily authorized range." (Appellee's brief, at 9.)

{¶ 39} To the extent defendant's contention about his sentence is separate from his motion to withdraw his guilty pleas, res judicata hinders his ability to challenge the sentence now. Defendant could and should have appealed from the sentences imposed if he believed it to be defective; because he failed to do so, res judicata bars his claim that he is entitled to have his sentences vacated and to undergo resentencing. *State v. Brown*, 167 Ohio App.3d 239, 2006-Ohio-3266, ¶ 7 (10th Dist.) (noting "a final judgment bars a convicted defendant * * * from raising and litigating in any proceeding, except on appeal from that judgment, any defense or any claimed lack of due process that the defendant raised or could have raised at trial or on appeal"). To the extent defendant intends his argument to be another reason the court should have allowed him to withdraw his pleas, it is unpersuasive.

{¶ 40} Defendant is correct that the consistency and proportionality requirements of R.C. 2929.11(B) obligate sentencing courts to institute punishments and sentences "consistent with sentences imposed for similar crimes committed by similar offenders." Even so, in *State v. Battle*, 10th Dist. No. 06AP-863, 2007-Ohio-1845, this court clarified that consistency " 'does not necessarily mean uniformity. * * * [C]onsistency accepts divergence within a range of sentences and takes into consideration a trial court's discretion to weigh relevant statutory factors. * * * Although offenses may be similar, distinguishing factors may justify dissimilar sentences.' " *Id.* at ¶ 24, quoting *State v. King*, 5th Dist. No. CT06-0020, 2006-Ohio-6566, ¶ 23.

{¶ 41} Because of these distinguishing factors, "a consistent sentence is not derived from a case by case comparison; rather, the trial court's proper application of the statutory sentencing guidelines ensures consistency." *State v. Hayes*, 10th Dist. No. 08AP-233, 2009-Ohio-1100, ¶ 9, citing *State v. Hall*, 10th Dist. No. 08AP-167, 2008-

Ohio-6228, ¶ 10. "Indeed, appellate courts have rejected consistency claims where one person involved in an offense is punished more severely than another involved in the same offense. * * * Additionally, we note there is no requirement that co-defendants receive equal sentences." *Id.*, citing *State v. Templeton*, 5th Dist. No. 2006-CA-33, 2007-Ohio-1148, ¶ 98; *State v. Brewer*, 11th Dist. No. 2008-A-0005, 2008-Ohio-3894, ¶ 19.

{¶ 42} Accordingly, in order to demonstrate that a sentence is inconsistent, a defendant cannot simply compare his sentence to the lighter sentences imposed upon his co-defendants. Rather, he must demonstrate the trial court failed to properly consider the statutory sentencing factors and guidelines found in R.C. 2929.11 and 2929.12. *Hayes* at ¶ 10, citing *State v. Holloman*, 10th Dist. No. 07AP-875, 2008-Ohio-2650, ¶ 19.

{¶ 43} Contrary to defendant's claim, the trial court's judgment entry imposing defendant's sentence states the court "considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12 and the decision of the Ohio Supreme Court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856." (R. 50, Judgment Entry, at 1.) Such statements defeat a claim that the trial court failed to consider the purposes and principles of felony sentencing as set forth in R.C. 2929.11 and 2929.12. *Battle* at ¶ 26.

{¶ 44} Moreover, the record precludes meaningful comparison of defendant's sentence to those of his co-defendants. Although defendant lists the sentences of Edwards, Willoughby, and Pruitt for "the felony," we lack the necessary information to conduct a full analysis pursuant to the sentencing factors enumerated in R.C. 2929.12. Of particular significance here are considerations "relating to the likelihood of the offender's recidivism," as appellant was indicted twice more on, and ultimately pled guilty to, unrelated criminal charges within a year of being indicted with his co-defendants for aggravated robbery in case No. 09CR-5033. R.C. 2929.12(A).

{¶ 45} Without further information, we can only observe the trial court properly could consider defendant's pattern of recidivism in deciding to impose a substantial sentence. Accordingly, the record does not indicate the trial court violated the provisions of R.C. 2929.11(B) requiring consistency in sentencing, and defendant's third assignment of error is overruled.

V. Disposition

{¶ 46} Having overruled defendant's three assignments of error, we affirm the judgments of the Franklin County Court of Common Pleas.

Judgments affirmed.

KLATT and CONNOR, JJ., concur.

AFFIDAVIT

STATE OF OHIO)
) SS.
COUNTY OF)
ROSS)

I Martin McMichael, hereby certify under the penalty of perjury that the information provided on this affidavit is True and Correct, to the best of my knowledge.

1) My name is Martin McMichael and I am the Appellant in the appeal from the judgment of the Franklin County Court of Appeals, Tenth Appellate District entered in Case No. 11AP-1042, 11AP-1043, and 11AP-1044 on July 12, 2012.
2) I am a pro se inmate at Ross Correctional Institution.
3) At this facility there are two distinct security levels housed here.
4) The library time here is limited and split between the two security levels.
5) Only 10 inmates from each separate unit is permitted at a time.
6) I had my Appeal to this Court and Memorandum In Support completed and ready for mail on August 22, 2012.
7) The deadline for filing my appeal to this Court was August 27, 2012.
8) I gave the completed documents to the mailroom here at the prison on August 22, 2012.
9) The next day the documents were returned to me because my account did not have sufficient funds to cover the postage.
10) After securing the funds, I re-submitted the documents to the mailroom on August 24, 2012.
11) The documents should have been received by this Court on August 27, 2012.
12) The documents were actually received by the Clerk for this Court on August 29, 2012 for reasons unknown to me and out of my control.
13) The documents were returned to me through "inter-departmental" mail on August 10, 2012.
14) I was always diligent in pursuing this appeal to this Court.

Martin McMichael

Before me Notary Public in and for said County and State, personally appeared the above who acknowledged that he did sign the foregoing document and that the same is his free and voluntary act.

In testimony whereof, I have hereunto set my hand and official seal on this 19, day of September, 2012.

NOTARIAL SEAL
STATE OF OHIO

J R BYRD
NOTARY PUBLIC
STATE OF OHIO
MY COMMISSION EXPIRES
NOVEMBER 16, 2015

Notary Public

RECEIVED
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SUPREME COURT OF OHIO