

[Cite as *State v. Cline*, 2009-Ohio-6208.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

JOHN G. CLINE

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. 09 CA 52

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Licking County Common
Pleas Court, Case No. 07 CR 194

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

November 20, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Hoffman, P.J.

{¶1} Defendant-appellant John G. Cline appeals the March 19, 2009 Judgment Entry entered by the Licking County Court of Common Pleas, which denied his Post-Sentence Motion/Petition of Defendant to Withdraw his Guilty Plea and Vacate his Conviction. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On April 13, 2007, the Licking County Grand Jury indicted Appellant on one count of aggravated murder, in violation of R.C. 2903.01(B) with a death penalty specification; one count of murder, in violation of R.C. 2903.02(B); one count of rape, in violation of R.C. 2907.02(A)(2); one count of tampering with evidence, in violation of R.C. 2921.12(A)(1); and one count of corrupting another with drugs, in violation of R.C. 2925.02(A)(4)(a) and/or (b) and (C)(3). Appellant appeared before the trial court for arraignment on April 23, 2007, and entered a plea of not guilty to the Indictment. Appellant executed a written time waiver on May 30, 2007. The case proceeded through discovery and other pretrial matters. The trial court scheduled a jury trial for May 19, 2008.

{¶3} On April 15, 2008, the parties appeared before the trial court and advised the court a plea agreement had been reached. Thereafter, the State moved the trial court to dismiss the aggravating circumstance specification to Count 1. The trial court conducted a Crim.R. 11 colloquy after which the trial court accepted Appellant's guilty pleas and granted the State's request to dismiss the specification. The trial court

immediately proceeded to sentencing, imposing a life sentence with the possibility of parole only after serving 46 ½ years.

{¶4} In a correspondence dated July 6, 2008, and filed on July 10, 2008, Appellant asked the trial court to appoint an attorney for purposes of filing an appeal. The trial court granted Appellant's request, and appointed Attorney David Sams. On November 12, 2008, Appellant filed a Post-Sentence Motion/Petition of Defendant to Withdraw his Guilty Plea and Vacate his Conviction. Therein, Appellant argued his guilty pleas were not knowingly, intelligently, and voluntarily entered because the trial court failed to advise him the State had to prove beyond a reasonable doubt he purposely caused the victim's death in addition to the commission of rape in order to receive the death penalty; he was waiving jury unanimity as well as the right to challenge jurors concerning that unanimity in open court in the event of a guilty verdict; waiving his right to present evidence of mental illness and voluntary intoxication in mitigation of punishment during the penalty phase; waiving his right to ensure juror impartiality by pursuing a change of venue; and waiving his right to pursue an insanity defense. The State filed a motion in opposition thereto. Via Judgment Entry filed March 19, 2009, the trial court denied Appellant's motion/petition.

{¶5} It is from this judgment entry Appellant appeals, raising the following assignments of error:

{¶6} "I. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES

CONSTITUTION, AND HIS PLEA WAS NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY ENTERED.

{¶7} “II. THE DEFENDANT-APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

{¶8} “III. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS UNDER ARTICLE I, SECTION OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE TRIAL COURT OVERRULED HIS MOTION TO WITHDRAW A PLEA WHICH WAS NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY ENTERED AND BY OTHERWISE OVERRULING HIS PETITION FOR POST-CONVICTION RELIEF.

{¶9} “IV. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT- APPELLANT IN VIOLATION OF DUE PROCESS UNDER ARTICLE I, SECTION 10 OF THE AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN IT APPLIED THE DOCTRINE OF RES JUDICATA AS A BAR TO HIS MOTION TO WITHDRAW HIS PLEA AND HIS PETITION [SIC] FOR POST-CONVICTION RELIEF.

I

{¶10} In his first assignment of error, Appellant maintains his due process rights were violated as his plea was not knowingly, intelligently and voluntarily entered. Appellant claims the trial court’s Crim.R. 11 colloquy was deficient as the trial court

failed to advise him of his right to jury unanimity; his right to ensure this unanimity through the polling of the jury; and his right to a fair and impartial jury right would be ensured through a change of venue. Appellant contends the trial court's failure to advise him of these rights was tantamount to the trial court's failure to advise him of his right to a trial by jury. Appellant further asserts his plea was not knowingly, intelligently and voluntarily made as he did not understand the nature of the charges against him and the possible penalties, as well as his right to understand possible defenses and the trial process.

{¶11} A Crim.R. 32.1 motion is not a challenge to the validity of a conviction or sentence, and instead only focuses on the plea. *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522, at ¶ 13. Subsequent to the imposition of a sentence, a trial court will only permit a defendant to withdraw his guilty plea in order to correct a manifest injustice. Crim.R. 32.1. A defendant bears the burden of proving a manifest injustice warranting the withdrawal of his guilty plea. *State v. Smith* (1977), 49 Ohio St.2d 261, 3 O.O.3d 402, 361 N.E.2d 1324, paragraph one of the syllabus. "A manifest injustice comprehends a fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the resulting prejudice through any form of application reasonably available to him." *State v. McQueen*, 7th Dist. No. 08 MA 24, 2008-Ohio-6589, at ¶ 7. See, also, *Smith*, supra at 264.

{¶12} A reviewing court will not disturb a trial court's decision to deny a motion to withdraw a guilty plea absent an abuse of discretion. *State v. Xie* (1992), 62 Ohio St.3d 521, 526, 584 N.E.2d 715. An abuse of discretion is more than error of law or judgment;

“it implies that the court's attitude is unreasonable, arbitrary or unconscionable.” *State v. Adams* (1980), 62 Ohio St .2d 151, 157, 16 O.O.3d 169, 404 N.E.2d 144.

{¶13} The issues Appellant raised in his motion to withdraw his guilty plea and PCR were cognizable on direct appeal and cannot be litigated for the first time in a post-conviction relief proceeding. *State v. Ishmail* (1981), 67 Ohio St.2d. 16, 18. Appellant did not file an appeal from his underlying conviction and sentence. “Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant 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* at the trial which resulted in that judgment of conviction or *on an appeal from that judgment.*” *State v. Perry* (1967) 10 Ohio St.2d 175, paragraph 9 of syllabus. (Emphasis added.) Moreover, this Court has held the doctrine of res judicata, likewise, applies to motions to withdraw guilty pleas. *State v. Corradetti*, 5th Dist. No.2008-CA-00194, 2009-Ohio-1347. As such, we find Appellant's claims are barred.

{¶14} Appellant’s first assignment of error is overruled.

II

{¶15} In his second assignment of error, Appellant raises a claim of ineffective assistance of counsel. Specifically, Appellant asserts trial counsel was ineffective for failing to fully advise him of the rights he was waiving by entering his guilty plea, and for failing to file a motion to suppress.

{¶16} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's

essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley* at 142, 538 N.E.2d 373. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists counsel's conduct fell within the wide range of reasonable professional assistance. *Id.*

{¶17} In order to warrant a reversal, the appellant must additionally show he was prejudiced by counsel's ineffectiveness. "Prejudice from defective representation sufficient to justify reversal of a conviction exists only where the result of the trial was unreliable or the proceeding fundamentally unfair because of the performance of trial counsel." *State v. Carter* (1995), 72 Ohio St.3d 545, 558, 651 N.E.2d 965, citing *Lockhart v. Fretwell* (1993), 506 U.S. 364, 370, 113 S.Ct. 838, 122 L.Ed.2d 180.

{¶18} The United States Supreme Court and the Ohio Supreme Court have held a reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Bradley* at 143, 538 N.E.2d 373, quoting *Strickland* at 697.

{¶19} The failure to file a suppression motion does not constitute per se ineffective assistance of counsel. *Kimmelman v. Morrison* (1986), 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305. Failure to file a motion to suppress constitutes ineffective assistance of counsel only if, based on the record, the motion would have

been granted. *State v. Butcher*, Holmes App.No. 03 CA 4, 2004-Ohio-5572, ¶ 26, citing *State v. Robinson* (1996), 108 Ohio App.3d 428, 433, 670 N.E.2d 1077.

{¶20} Appellant asserts counsel should have moved the trial court to suppress his confession because said confession was made while he was “in a debilitated physical and mental state precipitated by involuntary alcohol and drug abuse”. Post-Sentence Motion/Petition of Defendant to Withdraw his Guilty Plea and Vacate his Conviction at 3. Appellant has presented only his self-serving statements in support of his position. Such evidence, standing alone, is insufficient to rebut the record showing both understanding of the proceedings and effective assistance of counsel. See, *State v. Kapper* (1983), 5 Ohio St.3d 36, 38-39, 448 N.E.2d 823 (the court properly denied an evidentiary hearing when “the record indicates that appellant was not entitled to relief and that he failed to submit evidentiary documents apart from the bare allegations contained in his complaint.”).

{¶21} Upon review, Appellant has failed to demonstrate a reasonable probability a motion to suppress his statements would have been granted based upon the record before us. Further, Appellant has failed to demonstrate prejudice as a result of any alleged deficiency in trial counsel’s representation.

{¶22} Appellant’s second assignment of error is overruled.

III

{¶23} In his third assignment of error, Appellant contends he was denied his right to due process as a result of the trial court’s denial of his motion to withdraw his plea and petition for post-conviction relief.

{¶24} For the reasons set forth in Assignments of Error I and II, we overruled Appellant's third assignment.

IV

{¶25} Based upon our analysis of Appellant's second assignment of error, we overruled Appellant's fourth assignment of error.

{¶26} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Wise, J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ John W. Wise
HON. JOHN W. WISE

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

