**[Cite as *State v. Brown*, 2010-Ohio-364.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**Nos. 93216 and 93217**

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## STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

## MAURICE BROWN

DEFENDANT-APPELLANT

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**JUDGMENT:**
AFFIRMED

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Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-519310 and CR-517835

**BEFORE:** Gallagher, A.J., Kilbane, J., and McMonagle, J.

**RELEASED:** February 4, 2010

**JOURNALIZED:**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

SEAN C. GALLAGHER, A.J.:

**{¶ 1}** Defendant-appellant, Maurice Brown, appeals his convictions from the Cuyahoga County Court of Common Pleas, alleging that his plea was not knowingly, intelligently, and voluntarily entered into.

**{¶ 2}** Brown was charged in Cuyahoga County Common Pleas Case No. CR-517835 with felonious assault with a repeat violent offender specification and notice of prior conviction. He was also charged in Case No. CR-519310 with aggravated burglary and three counts of menacing by stalking, with repeat violent offender specifications and notice of prior conviction. The cases were consolidated for trial. On the date of trial, Brown pled guilty to attempted felonious assault in Case No. CR-517835, and pled guilty to burglary and one count of menacing by stalking. The repeat violent offender specifications and notice of prior convictions, as well as two counts of menacing by stalking were dismissed by the state. Brown was sentenced to four years in prison on each case, which sentences were to be served concurrently.

**{¶ 3}** Brown appealed both cases. The two cases were consolidated by this court. Brown sets forth one assignment of error for our review, which states the following:

**{¶ 4}** "Failure of defense counsel to perform any formal discovery or perform any investigation of the facts in any manner prior to counseling appellant to accept a guilty plea constitutes ineffective assistance of counsel."

**{¶ 5}** In order to substantiate a claim of ineffective assistance of counsel, the appellant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *State v. Trimble*, 122 Ohio St.3d 297, 310, 2009-Ohio-2961, 911 N.E.2d 242, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Judicial scrutiny of defense counsel's performance must be highly deferential. *Strickland*, 104 S.Ct. at 2065. In Ohio, there is a presumption that a properly licensed attorney is competent. *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905.

**{¶ 6}** "The *Strickland* test was applied to guilty pleas in *Hill v. Lockhart* (1985), 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203. 'First, the defendant must show that counsel's performance was deficient.' *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; *Hill*, 474 U.S. at 57, 106 S.Ct. at 369, 88 L.Ed.2d at 209. Second, 'the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty * * *.' *Hill*, 474 U.S. at 59, 106 S.Ct. at 370, 88 L.Ed.2d at

210; see *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693." *State v. Xie* (1992), 62 Ohio St.3d 521, 524, 584 N.E.2d 715.

**{¶ 7}** Brown contends that defense counsel was ineffective because he did not file a formal discovery request. He asserts that he needed to evaluate whether the element of "serious physical harm" could be established in his felonious assault case before he pled guilty to attempted felonious assault.

**{¶ 8}** In *Hill v. Lockhart*, the United States Supreme Court clarified application of this standard to test the validity of guilty pleas where it is claimed that counsel failed to investigate or discover exculpatory evidence:

> **"In many guilty plea cases, the 'prejudice' inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial."** ***Hill v. Lockhart,*** **474 U.S. at 59.**

**{¶ 9}** As for the lack of formal discovery filings pursuant to Crim.R. 16, such does not constitute a per se violation of reasonable representation. *State v. McIntosh*, Cuyahoga App. No. 81060, 2002-Ohio-4184, citing *State v. Wilson* (Oct. 22, 1992), Cuyahoga App. No. 61199. The reasonableness of

counsel's determination regarding the extent, method, and scope of any criminal pretrial discovery necessarily depends upon the particular facts and circumstances of each case. *State v. Degaro*, Butler App. No. CA2008-09-227, 2009-Ohio-2966, citing *Wilson*, supra.

**{¶ 10}** We find that Brown has failed to demonstrate that his trial counsel conducted an inadequate pretrial investigation. The record reflects that defense counsel obtained the police reports for both incidents and engaged in pretrial discovery conferences with the prosecutor, wherein he was advised of the evidence the state had against Brown.

**{¶ 11}** Likewise, Brown has failed to demonstrate any prejudice resulted from the trial counsel's failure to conduct formal written discovery. Although there is no evidence in the record before us that would establish the element of "serious physical harm" for the felonious assault charge, the recitation of the facts set forth by the state indicated that Brown repeatedly slammed the victim's head into concrete. Whether or not there was serious physical harm, it is clear Brown attempted to cause serious physical harm. Therefore, advising Brown to plead to attempted felonious assault is a reasonable assessment of the state's case.

**{¶ 12}** Further, the record establishes that the trial court also engaged in an extensive explanation of Brown's situation and discussed all of Brown's

concerns with Brown prior to his decision to plead guilty. Upon the record before us, we cannot say the Brown received ineffective assistance of counsel.

**{¶ 13}** Brown's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant 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 common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., CONCURS;
CHRISTINE T. MCMONAGLE, J., CONCURS IN JUDGMENT ONLY (WITH SEPARATE OPINION)

CHRISTINE T. McMONAGLE, J., CONCURRING IN JUDGMENT ONLY:

**{¶ 14}** I concur in judgment only. I cannot ascertain from this record what counsel did or did not do in preparation for this plea; accordingly, regularity must be presumed and the judgment affirmed. *State v. Doyle*, Cuyahoga App. Nos. 79981 and 79982, 2002-Ohio-2574; *State v. Marcus*, Cuyahoga App. No. 79768, 2002-Ohio-970.