

**IN THE COURT OF APPEALS OF OHIO**

SEVENTH APPELLATE DISTRICT  
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

MICHAEL N. CHILDS,

Defendant-Appellant.

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**OPINION AND JUDGMENT ENTRY**  
Case No. 16 CO 0016; 16 CO 0021

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Criminal Appeal from the  
Court of Common Pleas of Columbiana County, Ohio  
Case No. 2014 CR 236

**BEFORE:**

Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

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**JUDGMENT:**

Affirmed.

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*Atty. Robert Herron, Columbiana County Prosecutor, Atty. John E. Gamble, Assistant Prosecuting Attorney, 105 South Market Street, Lisbon, Ohio 44432 for Plaintiff-Appellee and*

*Atty. Wesley A Johnston P.O. Box 6041, Youngstown, Ohio 44501 for Defendant-Appellant.*

Dated: June 18, 2018

**ROBB, P.J.**

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{¶1} Defendant–Appellant Michael Childs appeals two judgments of the Columbiana County Court of Common Pleas, one convicting him of drug possession and sentencing him accordingly, and the other denying his motion for additional jail-time credit arising from the same sentence. On appeal, Appellant argues the trial court erred by imposing consecutive sentences and by denying his motion to withdraw his plea. He also asserts trial counsel was ineffective and jail-time credit was not properly imposed. For the following reasons, Appellant’s assignments of error are meritless. The judgments of the trial court are affirmed.

Statement of the Facts and Case

{¶2} On June 26, 2014, Appellant was indicted on one count of drug possession, R.C. 2925.11(A), a fifth-degree felony. 6/26/14 Indictment. Pursuant to a Crim.R. 11 plea agreement, Appellant pled guilty to the charge and the state agreed to recommend a ten-month prison sentence. The plea agreement noted that Appellant would request community control sanctions or a lesser sentence. 5/4/15 Plea Agreement; Plea Tr. 1-3.

{¶3} Following a plea hearing, the trial court accepted Appellant’s plea as knowingly, voluntarily and intelligently made and continued sentencing so that a presentence investigation (PSI) could be prepared. Plea Tr. 3-16; 5/4/15 J.

{¶4} Appellant failed to appear at the sentencing hearing; a bench warrant was issued. The sentencing hearing ultimately took place on May 12, 2016. The prosecutor stated that he was unsure of the reason Appellant failed to appear at the prior sentencing hearing, but suspected Appellant was incarcerated on separate charges in Mahoning County. Sentencing Tr. 2. Appellant responded he was not incarcerated at that time; rather, he had been shot and was unable to get in contact with his prior counsel. He explained he voluntarily surrendered and was sentenced in the Mahoning County case. Sentencing Tr. 3.

{¶5} Regarding sentencing, the state noted Appellant had a lengthy criminal

history in Ohio dating back to 1999, including attempted burglary, escape, receiving stolen property, carrying a concealed weapon, drug offenses, attempted tampering with evidence, improper handling of a firearm, and theft. Sentencing Tr. 4-5. The state also noted Appellant had an out-of-state criminal history. Sentencing Tr. 5. It contended Appellant failed to show remorse for his crimes, as demonstrated by Appellant's comments to East Liverpool police when they executed a search warrant, specifically that: "this is a cat and mouse game and they have to catch him." Sentencing Tr. at 5. Accordingly, the state requested a ten month prison sentence to be served consecutively to the sentence Appellant was currently serving for the Mahoning County conviction. Sentencing Tr. 6.

{¶16} Defense counsel argued Appellant had taken responsibility for his crimes and adequately explained his absence from the first sentencing hearing. Counsel requested the court to consider a lesser sentence and to run it concurrent to the term Appellant was currently serving. Sentencing Tr. 6-7. After being addressed by the trial court, Appellant gave a brief statement in mitigation of punishment. He conceded he had a drug problem, but said he had completed drug rehabilitation and had been in the Mahoning County jail for four months without any write-ups. He further noted the charge in this case stemmed from drug residue found in a sandwich bag in the trash. He said he knew what he did was wrong and asked the court to impose a six month, concurrent sentence. Sentencing Tr. 8-9.

{¶17} After considering the record, the information presented at the hearing, the principles and purposes of sentencing under R.C. 2929.11 and the seriousness and recidivism factors under R.C. 2929.12, and after making consecutive sentence findings under R.C. 2929.14, the trial court sentenced Appellant to ten months in prison, to be served consecutively to the prison sentence he was currently serving for the Mahoning County conviction. Sentencing Tr. 9-10; 5/16/16 J.E. The trial court also imposed three years of discretionary post-release control, a six-month driver's license suspension, and a lifetime weapons disability. Sentencing Tr. 10-12; 5/16/16 J.E.

{¶18} After the sentence was imposed, Appellant addressed the trial court personally and requested to withdraw his guilty plea, which the trial court denied. Sentencing Tr. 12-13. The sentencing entry indicated the trial court would grant jail-

time credit via a separate entry; the next day the trial court granted Appellant five days of credit, along with any future days while he awaited transportation to state prison. 5/16/16 J.E.; 5/17/16 J.E.

{¶9} On May 27, 2016, Appellant filed a pro-se motion for additional jail-time credit. He asserted he was entitled to 118 days of jail-time credit. He claimed he should have been granted credit from the time the Columbiana County Sheriff placed a detainer on him relating to this case while he was jailed on other charges in Mahoning County. 5/27/16 Motion.

{¶10} In a June 6, 2016 entry the trial court denied Appellant's motion, explaining the additional days were based on time in custody unrelated to this case. 6/6/16 J.E.

{¶11} Appellant filed separate but timely notices of appeal from both the May 15, 2016 sentencing entry and the June 6, 2016 entry denying the motion for additional jail-time credit. This court sua sponte consolidated the two appeals. 8/29/16 J.E.

#### First Assignment of Error

“The Trial Court erred because it did not follow the statutory framework before it imposed a consecutive sentence in an f5 [sic] drug possession charge, a court failed to consider the disproportionate under RC 2929.41.”

{¶12} Review of felony sentences is governed by R.C. 2953.08(G)(2). *State v. Marcum*, 146 Ohio St.3d 516, 2016–Ohio–1002, 59 N.E.3d 1231, ¶ 1. Under R.C. 2953.08(G)(2) an “appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law.” *Id.* at ¶ 1, 23. Clear and convincing evidence “is that measure or degree of proof which is more than a mere ‘preponderance of the evidence,’ but not to the extent of such certainty as is required ‘beyond a reasonable doubt’ in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” *Id.* at ¶ 22, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶13} A sentence is clearly and convincingly contrary to law if the sentence falls outside the statutory range for the particular degree of offense, the trial court failed to

consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the seriousness and recidivism factors in R.C. 2929.12, or if consecutive sentences are ordered and the trial court did not make the necessary consecutive sentence finding. *State v. Fenske*, 7th Dist. No. 16 JE 006, 2017–Ohio–7761, ¶ 26, (Indicating a sentence is contrary to law if the sentence falls outside statutory range and/or the trial court failed to consider R.C. 2929.11 and R.C. 2929.12); *State v. Bonnell*, 140 Ohio St.3d 209, 2014–Ohio–3177, 16 N.E.3d 659, ¶ 30 (Failing to make consecutive sentence findings at the sentencing hearing renders the sentence contrary to law.); *Marcum* at ¶ 23 (“[I]t is fully consistent for appellate courts to review those sentences that are imposed solely after consideration of the factors in R.C. 2929.11 and 2929.12 under a standard that is equally deferential to the sentencing court. That is, an appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence.”).

{¶14} Appellant’s arguments center on the trial court’s imposition of consecutive sentences. R.C. 2929.14(C)(4) requires three findings: that consecutive sentences are 1) necessary to protect the public from future crime or to punish the defendant; 2) not disproportionate to the seriousness of the defendant’s conduct and the danger the defendant poses to the public; and 3) one of three alternative findings set out in subsections: a) the defendant was under post-release control, specified statutory community control, or awaiting trial/sentencing; b) the offenses were committed during a course of conduct and the harm was so great/unusual that a single term does not reflect the seriousness of the defendant’s conduct; or c) the defendant’s criminal history demonstrates the need to protect the public from future crime by the defendant. R.C. 2929.14(C)(4).

{¶15} The findings supporting consecutive sentences must be made both at the sentencing hearing and in the entry. *Bonnell*, 2014-Ohio-3177 at ¶ 37. But a trial court is not required to state reasons supporting its findings or use magic or talismanic words, so long as it is apparent the court conducted the proper analysis. *State v. Jones*, 7th Dist. No. 13 MA 101, 2014–Ohio–2248, ¶ 6; see also *Bonnell* at ¶ 37. *Post-Bonnell*, we may liberally review the entire sentencing transcript to discern whether the trial court

made the requisite findings. *Bonnell* at ¶ 29. However, as demonstrated by the outcome in *Bonnell*—the Supreme Court reversed and remanded Bonnell's sentence because the trial court failed to make a proportionality finding—there are limits to that deference. *Bonnell* at ¶ 33–34. After a reviewing court determines the findings have been made, the court "must also determine whether the record contains evidence in support of the trial court's findings." *State v. Correa*, 7th Dist. 13 MA 23, 2015–Ohio–3955, ¶ 76, citing *Bonnell* at ¶ 29.

{¶16} The trial court made the following findings during the sentencing hearing:

Mr. Childs, I am inclined to accept the State's recommendation in this case and sentence you to ten months incarceration. I am inclined to order that served consecutively, based upon the past criminal record that I have heard about here today.

I do find that consecutive sentences are necessary to protect the public from future crime, to punish the offender, that consecutive sentences are not disproportionate to the seriousness, to [sic] the offender's conduct and the danger he poses to the public. His history of criminal conduct demonstrates consecutive sentences are necessary to protect the public from future crime by the offender.

Sentencing Tr. 10.

The sentencing entry states the following:

The Defendant is sentenced to a state correctional facility for 10 months, ordered served consecutively to the prison sentence he is currently serving from Mahoning County, Ohio. Pursuant to R.C. 2929.14, this Court finds that consecutive prison sentences are necessary to punish the offender, to protect the public from future crimes, and that consecutive sentences are not disproportionate to the seriousness of the Defendant's conduct and the danger he poses to the public. This Court also finds that the Defendant's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the Defendant.

5/16/16 J.E.

{¶17} Thus, the trial court clearly made all of the required findings. Furthermore, those findings are supported by the record. Appellant had a lengthy criminal history, failed to appear at the first sentencing hearing, and failed to show remorse for his crimes. Sentencing Tr. 2-9.

{¶18} Accordingly, the trial court properly imposed a consecutive sentence and Appellant's first assignment of error is meritless.

Second Assignment of Error

"Mr. Childs was denied his constitutional right to effective assistance of counsel at trial when the trial counsel failed to object to the Trial Court's imposition of a consecutive prison term sentence without properly following the statutory framework required for same at sentencing; for failing to object the trial court's denial of motion to withdraw plea; for the trial Court's failure at sentencing to impose the proper 118 days for credit owed to Defendant; and for the Trial Court's failure to properly advise defendant when prison sentence imposed contrary to the defendant's understanding of what was going to occur at sentencing from what Attorney advised client prior to entering plea."

{¶19} To prove ineffective assistance of counsel, the defendant must satisfy a two-prong test: first, counsel's performance has fallen below an objective standard of reasonable representation and second, Appellant was prejudiced by counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), at paragraph two of the syllabus. To demonstrate prejudice, the defendant must prove that, but for counsel's errors, the result of the trial would have been different. *Bradley*, paragraph three of the syllabus. In Ohio, a properly licensed attorney is presumed to be competent and the burden is on the defendant to prove otherwise. *State v. Hamblin*, 37 Ohio St.3d 153, 155, 524 N.E.2d 476 (1988). Moreover, counsel is not deemed deficient for failing to file meritless motions. *State v. Kelley*, 179 Ohio App.3d 666, 2008-Ohio-6598, 903 N.E.2d 365, ¶ 76 (7th Dist.).

{¶20} With regard to consecutive sentencing, counsel was not ineffective. As discussed, the trial court properly imposed consecutive sentences.

{¶21} Further, it does not appear counsel was ineffective for failing to object to the trial court's denial of Appellant's motion to withdraw his plea; the appropriate time to challenge that ruling is on appeal. See *State v. Bennett*, 9th Dist. No. 26241, 2012-Ohio-3664, ¶ 15 ("A denial of a post-sentence motion to withdraw a guilty plea is \* \* \* a final, appealable order.").

{¶22} As to credit for time served, the trial court granted Appellant's jail-time credit via a separate judgment entry. Even assuming counsel should have objected to the court's failure to grant jail-time credit at the sentencing hearing and in the sentencing entry, there is no prejudice since the court issued an order granting jail-time credit the next day. 5/17/16 J.E.

{¶23} Finally, Appellant argues trial counsel was ineffective for failing to object to the "Trial Court's failure to properly advise defendant when prison sentence imposed contrary to the defendant's understanding of what was going to occur at sentencing from what Attorney advised client prior to entering plea." There is no analysis on this point in the body of the brief and it is unclear what precisely Appellant is arguing. "The court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A)." App.R. 12(A)(2).

{¶24} For all of these reasons, Appellant's second assignment of error is meritless.

#### Third Assignment of Error

"The Court improperly denied defendant's motion to withdraw plea."

{¶25} During the sentencing hearing, just after the trial court pronounced sentence, Appellant, acting on his own accord, moved the court to withdraw his guilty plea. Sentencing Tr. 12-13. The trial court denied the motion without further hearing on the matter. Sentencing Tr. 13.

{¶26} Crim.R. 32.1 governs motions to withdraw a guilty plea and states: "A motion to withdraw a plea of guilty or no contest may be made 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." Crim.R.



32.1; *State v. Bush*, 96 Ohio St.3d 235, 2002–Ohio–3993, 773 N.E.2d 522, ¶ 8; *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), at paragraph one of the syllabus.

{¶27} A hearing on the motion must be held only if the facts alleged by the defendant, accepted as true, would require that the defendant be allowed to withdraw the plea. *State v. Brooks*, 7th Dist. No. 04 MA 240, 2005–Ohio–5058, ¶ 9. But, the trial court's decision whether to hold a hearing is granted deference. *State v. Toda*, 7th Dist. No. 13 MA 44, 2014–Ohio–943, ¶ 10. "Deference especially attends in a case in which the record demonstrates the court conducted the original plea hearing and was familiar with the facts of the case. In such circumstances, the trial court is in the best position to assess the credibility of the movant's assertions." *Id.* at ¶ 10, quoting *State v. Atkinson*, 8th Dist. No. 85773, 2005–Ohio–5348, ¶ 13–14.

{¶28} The manifest injustice required to vacate a plea post-sentence can only be established in extraordinary cases and has been defined by the Ohio Supreme Court as a "clear or openly unjust act." *Smith*, 49 Ohio St.2d at 264; *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 699 N.E.2d 83 (1998). Additionally, "[t]his court has referred to a manifest injustice as 'an extraordinary and fundamental flaw in the plea proceeding.'" *State v. Fry*, 7th Dist. No. 12 MA 156, 2013–Ohio–5865, ¶ 12, quoting *State v. Lintner*, 7th Dist. No. 732, 2001 WL 1126654 (Sept. 21, 2001). The purpose of the manifest injustice requirement is to avoid the possibility of a defendant pleading guilty to test the weight of potential punishment. *Smith* at 264.

{¶29} An appellate court reviews the disposition of a motion to withdraw a guilty plea for an abuse of discretion. *State v. Carabello*, 17 Ohio St.3d 66, 67, 477 N.E.2d 627 (1985). "Abuse of discretion means an error in judgment involving a decision that is unreasonable based upon the record; that the appellate court merely may have reached a different result is not enough." *State v. Dixon*, 7th Dist. No. 10 MA 185, 2013–Ohio–2951, ¶ 21.

{¶30} We conclude the trial court did not abuse its discretion when it denied Appellant's motion. It appears Appellant was merely unhappy with the sentence the trial court imposed. He stated he would have never entered into the plea agreement had he known he could have received the sentence he did. Sentencing Tr. 13. However, there is nothing irregular about the plea proceedings, and Appellant was warned of the

potential penalties he faced. Plea Tr. 8; 5/4/15 Judicial Advice to Defendant. Appellant has failed to demonstrate manifest injustice, and therefore the trial court properly denied his motion to withdraw his plea. Accordingly, this assignment of error is meritless.

#### Fourth Assignment of Error

“The Court improperly denied defendant's motion for jail time credit of 118 days.”

{¶31} An offender is not entitled to jail-time credit for any period of incarceration that arose from facts that are separate and apart from those on which his current sentence is based. R.C. 2967.191; *State v. Mason*, 7th Dist. No. 10 CO 20, 2011–Ohio–3167, ¶ 16. There is no jail-time credit for time served on unrelated offenses, in county or otherwise, even if that time served runs concurrently during the pre-detention phase of another matter. *State v. Cook*, 7th Dist. No. 00CA184, 2002–Ohio–7170, ¶ 17; *State v. Daughenbaugh*, 3d Dist. No. 16–09–05, 2009–Ohio–3823, ¶ 19.

{¶32} Appellant asserts the trial court should have granted him jail-time credit from the time the Columbiana County Sheriff's Office issued a detainer for him. However, since Appellant was incarcerated on unrelated offenses from Mahoning County during the pre-detention phase of this case, he was not entitled to additional jail-time credit. The trial court properly denied his motion. See *State v. Blackstone*, 7th Dist. No. 16 NO 0437, 2017-Ohio-4392, ¶ 7 (“As Blackstone was serving a prison term for a felony conviction in Monroe County, he is not entitled to jail time credit from the date on his arraignment in this case. Thus, the trial court did not err in refusing to grant Blackstone jail time credit, and his assignment of error is meritless.”)

{¶33} This assignment of error lacks merit.

#### Conclusion

{¶34} In sum, all of Appellant's assignments of error are meritless and the judgments of the trial court are affirmed.

Donofrio, J., concurs.

Waite, J., concurs

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For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

**NOTICE TO COUNSEL**

**This document constitutes a final judgment entry.**