[Cite as *State v. Holloway*, 2018-Ohio-5393.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JERMAILL or JERMAIL HOLLOWAY,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 MA 0048

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 16 CR 1351

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

JUDGMENT:
Affirmed

Atty. Ralph Rivera, Mahoning County Prosecutor's Office, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee, and

Atty. Christopher Lacich, Roth, Blair, Roberts, Strasfeld & Lodge, 100 East Federal Street, Suite 600, Youngstown, Ohio 44503, for Defendant-Appellant.

Dated: December 27, 2018

Donofrio, J.

{¶1} Defendant-appellant, Jermaill Holloway, appeals from a Mahoning County Common Pleas Court judgment convicting him of voluntary manslaughter and felonious assault, following his guilty pleas.

{¶2} On March 20, 2016, appellant and the victims were celebrating a birthday at a home. During the party, an argument broke out. Individuals at the party asked appellant to leave. Appellant left the house but was still outside when an argument broke out. Numerous people from the party were outside. An exchange of gunfire ensued between appellant and another party goer. Two people were shot, one of whom died.

{¶3} On December 1, 2016, a Mahoning County Grand Jury indicted appellant on two counts of murder, first-degree felonies in violation of R.C. 2903.02(A)(D) and (B)(D); one count of improper discharge of a weapon into a habitation, a second-degree felony in violation of R.C. 2923.161(A)(1)(D); and eight counts of felonious assault, second-degree felonies in violation of R.C. 2903.11(A)(2)(D). Firearm specifications accompanied all counts. Appellant originally entered a plea of not guilty.

{¶4} On March 2, 2017, appellant changed his plea to guilty after reaching a plea agreement with plaintiff-appellee, the State of Ohio. The state agreed to dismiss the two counts of murder, amending the indictment to a single count of voluntary manslaughter, a first-degree felony in violation of R.C. 2903.03(A)(C), and eight counts of felonious assault, all with firearm specifications. The state also dismissed appellant's pending rape and aggravated burglary charges from a separate incident. The state agreed to argue for an 18-year sentence, while appellant would argue for a lesser sentence.

{¶5} On March 9, 2017, the court sentenced appellant to eight years in prison on the voluntary manslaughter count, four years on each of the eight felonious assault counts, and three years on the firearm specifications that it found merged. The court ordered appellant to serve the felonious assault sentences concurrent with each other but consecutive to the voluntary manslaughter sentence and the firearm specification

sentence. In total, the court sentenced appellant to 15 years in prison. On March 10, 2017, appellant sent a pro se letter to the trial court, which the court construed as a motion to withdraw his guilty plea. The court held a status conference to address appellant's letter. After listening to appellant's arguments, the court denied appellant's motion to withdraw his plea.

{¶6} Appellant filed a timely notice of appeal March 17, 2017. He now raises four assignments of error.

{¶7} Appellant's first assignment of error states:

> THE TRIAL COURT ERRED BY ALLOWING APPELLANT TO ENTER HIS GUILTY PLEA, AFTER HIS STATEMENTS OF INNOCENCE AND FEELING PRESSURED/RUSHED TO PLEAD TO THE CHARGES ON RECORD AT THE PLEA HEARING, IN VIOLATION OF HIS RIGHTS UNDER OHIO AND FEDERAL LAW.

{¶8} Appellant argues that it was error for the trial court to accept his plea after he professed his innocence. He states that the fast-approaching trial date pressured him into the plea without having time to consider it with his family. He points out that he is a novice to the criminal justice system with no prior felony convictions. Thus, appellant claims that he did not enter his plea knowingly, voluntarily, and intelligently.

{¶9} When determining the validity of a plea, this court must consider all of the relevant circumstances surrounding it. *State v. Trubee*, 3d Dist. No. 9-0365, 2005-Ohio-552, ¶ 8, citing *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463 (1970). Pursuant to Crim.R. 11(C)(2), the trial court must follow a certain procedure for accepting guilty pleas in felony cases. Before the court can accept a guilty plea to a felony charge, it must conduct a colloquy with the defendant to determine that he understands the plea he is entering and the rights he is voluntarily waiving. Crim.R. 11(C)(2). If the plea is not knowing, intelligent, and voluntary, it has been obtained in violation of due process and is void. *State v. Martinez*, 7th Dist. No. 03-MA-196, 2004-Ohio-6806, ¶ 11, citing *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709 (1969).

{¶10} A trial court must strictly comply with Crim.R. 11(C)(2) pertaining to the waiver of federal constitutional rights. *Martinez,* at ¶ 12. These rights include the right against self-incrimination, the right to a jury trial, the right to confront one's accusers, the right to compel witnesses to testify by compulsory process, and the right to proof of guilt beyond a reasonable doubt. Crim.R. 11(C)(2)(c).

{¶11} The trial court strictly complied with Crim.R. 11(C)(2) by advising appellant of each of the constitutional rights he was waiving by entering a guilty plea. Specifically, the court advised appellant that the state would have to prove him guilty beyond a reasonable doubt, the right to confront the witnesses against him, the right to compel witnesses on his behalf, the right against self-incrimination, and the right to a jury trial. (Plea Tr. 11).

{¶12} A trial court need only substantially comply with Crim.R. 11(C)(2) pertaining to non-constitutional rights such as informing the defendant of "the nature of the charges with an understanding of the law in relation to the facts, the maximum penalty, and that after entering a guilty plea or a no contest plea, the court may proceed to judgment and sentence." *Martinez*, at ¶ 12, citing Crim.R. 11(C)(2)(a)(b).

{¶13} The trial court substantially complied with Crim.R. 11(C)(2) by advising appellant of his non-constitutional rights as well. The court explained the nature of the charges to appellant and asked if he understood that by pleading guilty he was admitting each element of each offense. (Plea Tr. 10). Additionally, the court informed appellant of the maximum sentences he faced on each charge and told him that it could proceed immediately to sentencing. (Plea Tr. 13).

{¶14} Thus, in terms of Crim.R. 11(C)(2), appellant's entered his plea knowingly, voluntarily, and intelligently.

{¶15} Appellant, however, claims he did not enter his plea knowingly, voluntarily, and intelligently based on another ground. He asserts he was rushed into his decision and told the court that he acted in self-defense.

{¶16} Initially, at the change of plea hearing when the trial court informed appellant that by pleading guilty he was admitting to each element of each offense, appellant responded: "I'm sorry, Your Honor. I can't - - I can't admit to things I didn't do. It's very - - it's very hard. It's very hard." (Plea Tr. 4). The court then explained to

appellant that he did not have to enter a plea, he could instead go to trial on Monday (four days later). (Plea Tr. 4-5). Appellant responded that he understood that. (Plea Tr. 5). Appellant further told the court that he wished he had 10, 20, or 30 days to discuss the matter with his family. (Plea Tr. 5). The court again told appellant the decision was up to him, but that he had to make a decision. (Plea Tr. 6).

{¶17} The court then asked appellant if he wanted to accept the plea deal or not. (Plea Tr. 7). Appellant stated that he did, but then he questioned the 18-year sentence the state was recommending. (Plea Tr. 7). The court too expressed confusion as to what the state would recommend, thinking the recommendation was for 15 years. (Plea Tr. 7-8). Defense counsel stated that there had been two different offers but that the state was now recommending an 18-year sentence. (Plea Tr. 8). The court called a recess so that appellant could further discuss with his counsel whether he wanted to accept the plea deal. (Plea Tr. 9).

{¶18} After the recess, appellant's counsel stated that appellant wanted to go forward with the plea deal. (Plea Tr. 9-10). The trial court then conducted the Crim.R. 11(C)(2) plea colloquy with appellant and accepted his guilty plea. (Plea Tr. 10-20). Appellant did not raise any questions or profess his innocence at any point after the recess where he conferred with his counsel.

{¶19} Appellant argues that the trial court should not have accepted his plea due to his claim of innocence. Thus, appellant's plea could be construed as an *Alford* plea. A heightened inquiry is required when a defendant interjects claims of innocence into his plea. *North Carolina v. Alford*, 400 U.S. 25, 27 L.Ed.2d 162, fn 10 (1970).

{¶20} When the defendant enters an *Alford* plea, the trial court must inquire into the factual basis of the plea in order to reconcile the defendant's claim of innocence with his plea of guilty. *State v. Redmond*, 7th Dist. No. 17-MA-0068, 2018-Ohio-2778, ¶ 14; *State v. Johnson*, 8th Dist. No. 103408, 2016-Ohio-2840, ¶ 27.

{¶21} In order for a valid *Alford* plea to take place, the defendant must protest innocence at the same time he enters his guilty plea. *State v. Johnson*, 8th Dist. No. 103408, 2016-Ohio-2840, ¶ 27, citing *State v. Tyner*, 8th Dist. No. 97403, 2012-Ohio-2770. "'Implicit in any *Alford* plea is the requirement a defendant actually state his

innocence on the record *when entering a guilty plea*.'" (Emphasis added.) *Id*., quoting *State v. Murphy*, 8th Dist. No. 68129, 1995 WL 517057 (Aug. 31, 1995).

{¶22} In the case at bar, when the trial court first attempted to conduct the plea colloquy with appellant, he asserted to the trial court that he "didn't do" it. (Plea Tr. 4). The court then told appellant he did not have to accept the plea deal but that he needed to make up his mind as to what he wished to do. (Plea Tr. 4-5). Appellant then told the court he felt that he was being rushed to make a decision. (Plea Tr. 5-6). He also expressed to the court that he was confused as to what the sentence the state would be recommending. (Plea Tr. 7). The court too expressed confusion as to the terms of the plea deal as far as the sentencing recommendation. (Plea Tr. 7-8). Consequently, the court called a recess for the parties to confer. (Plea Tr. 9).

{¶23} Once the hearing reconvened, the court asked what the parties had decided. (Plea Tr. 9). Appellant's counsel then stated that appellant wanted to go forward with the plea and that the sentencing issue had been resolved. (Plea Tr. 9-10). The court then began a new plea colloquy with appellant. (Plea Tr. 10). During this colloquy, appellant never professed his innocence or suggested that he was not guilty.

{¶24} The Third District recently held that when the defendant does not specify that the plea is pursuant to *Alford* and the defendant recants their claim of innocence, the court does not need to conduct a heightened *Alford* inquiry. *State v. Swoveland*, 3d Dist. No. 15-17-14, 2018-Ohio-2875, ¶ 18-20.

{¶25} In *Swoveland*, during the first plea colloquy Swoveland made statements to the court that he was seeking community service, which he was not eligible for, and that he was not guilty of what he was accused of. *Id*. at ¶ 14. After Swoveland made these statements, the trial court stopped the sentencing hearing to allow him to consult with his trial counsel. *Id*. After Swoveland conferred with his counsel, the trial court began the second plea colloquy. *Id*. It inquired if Swoveland understood that he was subject to a mandatory minimum prison sentence, which he stated that he did. *Id*. The court then continued with the plea colloquy where Swoveland pleaded guilty to the charges without professing his innocence. *Id*. at ¶ 19. The Third District interpreted the second plea colloquy, which occurred without interjections of innocence, as a recanting of the claim of innocence. *Id.* at ¶ 20.

{¶26} As was the case in *Swoveland*, when the trial court here realized there was some confusion regarding the plea, it stopped the proceedings and allowed appellant to confer with his counsel. And when the court reconvened, appellant proceeded with his guilty plea without any mention of being innocent or of *Alford*. Thus, the trial court was not required to conduct a heightened *Alford* inquiry of appellant.

{¶27} Accordingly, appellant's first assignment of error is without merit and is overruled.

{¶28} Appellant's second assignment of error states:

> THE TRIAL COURT ERRED BY IMPOSING A SENTENCE CLEARLY AND CONVINCINGLY CONTRARY TO LAW, EXCESSIVE, AND VIOLATIVE OF DUE PROCESS, WHEN THE RECORD REVEALS THAT APPELLANT WAS CLAIMING INNOCENCE ON THE BASIS OF SELF-DEFENSE, THE TRIAL COURT WAS UNAWARE OF MANY OF THE IMPORTANT DETAILS/FACTS CONCERING THE CASE JUST PRIOR TO IMPOSING ITS FIFTEEN YEAR SENTENCE, AS WELL AS THE LACK OF PROOF THAT APPELLANT'S GUN FIRED THE BULLET THAT CAUSED THE DECEDANT'S DEATH.

{¶29} Appellant argues that his 15-year sentence was clearly and convincingly contrary to law.

{¶30} When reviewing a felony sentence, an appellate court must uphold the sentence unless the evidence clearly and convincingly does not support the trial court's findings under the applicable sentencing statutes or the sentence is otherwise contrary to law. *State v. Marcum*, 146 Ohio St. 3d 516, 2016-Ohio-1002, 59 N.E. 3d 1231, ¶ 1.

{¶31} Voluntary manslaughter is a first-degree felony. The possible prison sentences for a first-degree felony are three, four, five, six, seven, eight, nine, ten, or eleven years. R.C. 2929.14(A)(1). The court sentenced appellant to eight years on this count. Felonious assault is a second-degree felony. The possible prison sentences for a second-degree felony are two, three, four, five, six, seven, or eight years. R.C. 2929.14(A)(2). The trial court sentenced appellant to four years on each of the felonious assault counts. The trial court also sentenced appellant to three years for the

firearm specification, which was mandatory pursuant to R.C. 2941.145(A). Thus, each of appellant's sentences complied with the applicable statute.

{¶32} In sentencing a felony offender, the court must consider the overriding principles and purposes set out in R.C. 2929.11, which are to protect the public from future crime by the offender and others and to punish the offender. The trial court shall also consider various seriousness and recidivism factors as set out in R.C. 2929.12(B)(C)(D)(E). The trial court indicated both at the hearing and again in its judgment entry that it considered both the principles and purposes of sentencing and the seriousness and recidivism factors.

{¶33} The court also issued appellant consecutive sentences. R.C. 2929.14(C)(4) requires a trial court to make specific findings when imposing consecutive sentences:

> (4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶34} It has been held that although the trial court is not required to recite the statute verbatim or utter "magic" or "talismanic" words, there must be an indication that the court found (1) that consecutive sentences are necessary to protect the public from future crime or to punish the offender, (2) that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger posed to the public, and (3) one of the findings described in R.C. 2929.14(C)(4)(a), (b), or (c). *State v. Bellard*, 7th Dist. No. 12-MA-97, 2013-Ohio-2956, ¶ 17. The court need not give its reasons for making those findings however. *State v. Power*, 7th Dist. No. 12 CO 14, 2013-Ohio-4254, ¶ 38. A trial court must make the consecutive sentence findings at the sentencing hearing and must additionally incorporate the findings into the sentencing entry. *State v. Williams*, 7th Dist. No. 13-MA-125, 2015-Ohio-4100, ¶ 33-34, citing *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37.

{¶35} In this case, the court specifically found on the record that consecutive sentences were necessary to protect the public from future crime and to punish appellant. (Sent. Tr. 21). The court found that consecutive sentences were not disproportionate to the seriousness of offender's conduct. (Sent. Tr. 21). In addition, the court found that a single term did not adequately reflect the seriousness of the conduct. (Sent. Tr. 21). The judgment entry reflects these considerations. Thus, the trial court complied with R.C. 2929.14(C)(4) in imposing consecutive sentences.

{¶36} Accordingly, appellant's second assignment of error is without merit and is overruled.

{¶37} Appellant's third assignment of error states:

> THE TRIAL COURT ERRED IN NOT ALLOWING APPELLANT TO WITHDRAW HIS GUILTY PLEA POST-SENTENCE, FOR A MANIFEST INJUSTICE OCCURRED IN HIS CASE.

{¶38} Appellant argues that the court should have allowed him to withdraw his post-sentence guilty plea. Appellant raises largely the same argument as in his first assignment of error. Appellant mailed the court a letter approximately seven days after sentence was imposed, arguing that he was wronged in a number of ways. The court held a status hearing and interpreted the letter as a motion to withdraw his plea. The court then denied the motion, saying that appellant did not establish that a manifest injustice occurred.

{¶39} The decision whether to grant or deny a defendant's motion to withdraw a guilty plea is within the trial court's discretion. *State v. Xie*, 62 Ohio St.3d 521, 526, 584 N.E.2d 715 (1992). Abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶40} Crim.R. 32.1 provides: "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." This rule establishes a fairly stringent standard for deciding a post-sentence motion to withdraw a guilty plea. *Xie*, 62 Ohio St.3d at 526.

{¶41} The burden of establishing the existence of manifest injustice is on the individual seeking to vacate the plea. *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus. Under the manifest injustice standard, a post-sentence motion to withdraw a plea is allowed only in extraordinary cases. *Id.* at 264. "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." *Id.*, citing *Kadwell v. United States*, 315 F.2d 667, 670 (9th Cir.1963).

{¶42} As discussed above, the trial court's colloquy with appellant demonstrated that appellant was informed of the charges against him and well aware of the rights he was waiving. Moreover, appellant indicated that he was satisfied with his counsel and the advice counsel provided him. (Plea Tr. 11). Additionally, given the charges appellant initially faced, both in this case and in another case, his counsel was

able to negotiate a favorable plea deal for appellant. And the trial court even imposed a lesser sentence than that recommended by the state.

{¶43} Furthermore, at the hearing on his motion to withdraw, appellant largely argued the facts of the case. He did not assert a manifest injustice that would invalidate his plea.

{¶44} Given the above, the trial court did not abuse its discretion in denying appellant's post-sentence motion to withdraw his plea.

{¶45} Accordingly, appellant's third assignment of error is without merit and is overruled.

{¶46} Appellant's fourth assignment of error states:

> PLEA COUNSEL WAS INEFFECTIVE BY HIS FAILURE TO PROPERLY PREPARE AND INVESTIGATE, PRE-PLEA, AND/OR BY HIS FAILURE TO FILE A MOTION TO WITHDRAW AS COUNSEL UPON REPEATED REQUESTS BY APPELLANT, PRE-PLEA AND/OR FOR HIS FAILURE TO CALL FOR AN EXTENDED RECESS TO PROTECT APPELLANT'S RIGHTS AND INTERESTS WHEN HIS CLIENT INDICATED AT THE PLEA HEARING THAT HE WAS INNOCENT OF ALL COUNTS, WAS UNCOMFORTABLE WITH THE PACE OF THE PROCESS AND MISUNDERSTOOD THE TERMS OF THE RULE 11 AGREEMENT, AND APPELLANT ENTERED A GUILTY PLEA TO A CRIME HE DID NOT COMMIT AS A RESULT.

{¶47} Appellant argues that his trial counsel committed numerous errors which rendered counsel's assistance deficient.

{¶48} To prove an allegation of ineffective assistance of counsel, the appellant must satisfy a two-prong test. First, appellant must establish that counsel's performance has fallen below an objective standard of reasonable representation. *Strickland v. Washingto*n, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph two of the syllabus. Second, appellant must demonstrate that he was prejudiced by counsel's performance. *Id.* To show that he has been prejudiced by counsel's deficient

performance, appellant must prove that, but for counsel's errors, the result of the trial would have been different. *Bradley*, at paragraph three of the syllabus.

{¶49} Appellant bears the burden of proof on the issue of counsel's ineffectiveness. *State v. Calhoun*, 86 Ohio St.3d 279, 289, 714 N.E.2d 905 (1999). In Ohio, a licensed attorney is presumed competent. *Id*.

{¶50} First, appellant alleges that trial counsel's pre-trial investigation was insufficient. But there is nothing in the record regarding how counsel went about the investigation. If the evidence of ineffective assistance of counsel is not in the record, the subject is not available for analysis by this court. *State v. Prieto*, 7th Dist. No. 07-MA-4, 2007-Ohio-7204, ¶ 36. There is no way for this court to know what steps trial counsel took to investigate, therefore any opinion on the effectiveness of the investigation would be conjecture.

{¶51} Second, appellant argues that trial counsel's failure to motion for a recess during the plea hearing was deficient because appellant stated his displeasure with how quickly the court was moving. The court clearly indicated at the hearing that this was appellant's last opportunity to take the plea. The court stated "[a]nd there's no deal after now. That's – the deal was closed at noon. It's now 10 to 5, and I've extended this as far as I can in that regard." (Plea Tr. 6). The court made its position clear, appellant would accept the plea deal that day or go to trial. Thus, any motion to continue by appellant's counsel would have been futile.

{¶52} Third, appellant argues that trial counsel failed to correct the prosecution's incorrect or misleading facts at various points in the proceedings. But there is nothing in the record to suggest that the version of the facts the state presented was incorrect. Appellant provides no specifics regarding what was incorrectly stated. Again, appellant cannot substantiate a claim for ineffective assistance if the evidence is outside of the record on appeal.

{¶53} Fourth, appellant contends that trial counsel never filed a formal motion to withdraw after appellant requested him to. The trial court specifically addressed this claim and told appellant at the status hearing that counsel did not make the motion because the court would not grant it. (Status Hearing Tr. 26-28). It follows that counsel was not ineffective for failing to make a motion the court already told him it would deny.

{¶54} Accordingly, appellant's fourth assignment of error is without merit and is overruled.

{¶55} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

Robb, P. J., concurs.

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 Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

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.