[Cite as *State v. Vaughn*, 2020-Ohio-6971.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

MELVIN VAUGHN,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case Nos. 19 MA 0097; 20 MA 0006

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case Nos. 15 CR 178; 19 CR 151;

BEFORE:
Cheryl L. Waite, Carol Ann Robb, Judges and Judge Mary Jane Trapp, Judge of the Eleventh District Court of Appeals, Sitting by Assignment.

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor and *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee

Atty. Christopher P. Lacich, Roth, Blair, 100 East Federal St., Suite 600, Youngstown, Ohio 44503, for Defendant-Appellant

Dated: December 4, 2020

WAITE, P.J.

{¶1} Appellant Melvin Vaughn appeals two Mahoning County Court of Common Pleas judgment entries. The first entry, dated September 9, 2019, pertains to case number 15 CR 178. The second entry, dated June 13, 2019, pertains to case number 19 CR 151. Appellant urges that his trial counsel was ineffective for advising him to plead guilty to the charges contained in case number 19 CR 151. Counsel was also ineffective in advising him to admit that his actions in 19 CR 151 amounted to a violation of his probation in case number 15 CR 178. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} On March 19, 2015, Appellant was indicted in case number 15 CR 178 on one count of burglary, a felony of the second degree in violation of R.C. 2911.12(A)(2), (D). On January 20, 2016, Appellant pleaded guilty to the sole offense as charged and was sentenced to four years of incarceration. The trial court also ordered Appellant to pay restitution to the victim.

{¶3} On May 19, 2017, Appellant filed a motion for judicial release, which was denied by the trial court. On March 29, 2018, Appellant filed a second motion for judicial release. At this time, after holding a hearing the trial court granted the motion under the following conditions: Appellant was to serve a three-year community control term, comply with the terms of the Adult Parole Authority, have no contact with the victim, and

commence restitution payments. The court informed Appellant that he would be required to serve the remainder of his original sentence if he violated any condition of his release.

{¶4} On February 7, 2019, the state filed a motion to revoke Appellant's community control and the next day Appellant waived his right to a probable cause hearing. On March 7, 2019, Appellant was indicted in case number 19 CR 151 on one count of receiving stolen property, a felony of the fifth degree in violation of R.C. 2913.51(A), (C), and one count of misuse of a credit card, a misdemeanor of the first degree in violation of R.C. 2913.21(B)(2), (D)(3). This indictment served the basis for the probation violation in Appellant's earlier criminal conviction.

{¶5} On April 5, 2019, Appellant pleaded guilty to receiving stolen property and the state dismissed the misuse of a credit card charge in case number 19 CR 151.

{¶6} On May 2, 2019, Appellant filed a motion to amend his bond. On May 15, 2019, the trial court overruled the motion.

{¶7} On May 17, 2019, Appellant stipulated to his probation violation. The trial court ordered Appellant to serve the remainder of the four-year original sentence ordered in case number 15 CR 178, with credit for 824 days served. The court imposed a mandatory three-year postrelease control term. For the later criminal behavior in case number 19 CR 151, the trial court imposed one year of incarceration. The court also imposed a discretionary postrelease control term. The trial court ordered the sentences to run concurrently.

{¶8} At the conclusion of the trial court proceedings, Appellant filed a motion to amend his bond which was denied. We overruled his "Application for Release on Bail

and Suspension of Execution of Sentence, Pending Appeal and for Limited Remand on Sentencing Issue."

{¶9} While the matter was pending on appeal, the trial court issued a judgment entry correcting Appellant's jail time credit. In the entry the court granted additional days of credit.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED AND IMPOSED A SENTENCE CLEARLY AND CONVINCINGLY CONTRARY TO LAW, BY FAILING TO CREDIT THE DEFENDANT-APPELLANT FOR ALL DAYS INCARCERATED AT 15 CR 178 [ODRC, local, future time]

{¶10} Appellant first argues that the trial court erroneously calculated his jail time credit. As earlier stated, during the pendency of this appeal the trial court held a hearing and modified Appellant's jail time credit. Hence, Appellant voluntarily dismissed this assignment of error.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED AND IMPOSED A SENTENCE CLEARLY AND CONVINCINGLY CONTRARY TO LAW AT 19 CR 151, IN AS MUCH AS DEFENDANT-APPELLANT'S GUILTY PLEA WAS NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY ENTERED.

ASSIGNMENT OF ERROR NO. 3

PLEA COUNSEL WAS INEFFECTIVE FOR NOT SEEKING PRE-PLEA BAIL, FOR ADVISING DEFENDANT-APPELLANT IN CONNECTION

WITH HIS ENTERING A PLEA AT 19 CR 151 TO RECEIVING STOLEN PROPERTY [R.C. 2913.51 (A) and R.C. 2913.51 (C)], A FELONY OF THE 5TH DEGREE, AND FOR ADVISING HIM TO ADMIT TO A PROBATION VIOLATION AT 15 CR 178 A LITTLE MORE THAN SIXTY DAYS AFTER INDICTMENT, WHEN THE RECORD RELECTS THAT DEFENDANT-APPELLANT HAD VIABLE DEFENSES AT 19 CR 151.

{¶11} For ease of understanding, Appellant's arguments under his second and third assignments of error will be jointly addressed.

{¶12} The test for ineffective assistance of counsel is two-part: whether trial counsel's performance was deficient and, if so, whether the deficiency resulted in prejudice. *State v. White*, 7th Dist. Jefferson No. 13 JE 33, 2014-Ohio-4153, ¶ 18, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶ 107. In order to prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Lyons*, 7th Dist. Belmont No. 14 BE 28, 2015-Ohio-3325, ¶ 11, citing *Strickland* at 694. The appellant must affirmatively prove the alleged prejudice occurred. *Strickland* at 693.

{¶13} Because an appellant must satisfy both *Strickland* prongs, if one prong is not met, an appellate court need not address the remaining prong. *Id*. at 697. The appellant bears the burden of proof on the issue of counsel's effectiveness, and in Ohio, a licensed attorney is presumed competent. *State v. Carter*, 7th Dist. Columbiana No.

2000-CO-32, 2001 WL 741571 (June 29, 2001), citing *State v. Calhoun*, 86 Ohio St.3d 279, 289, 714 N.E.2d 905 (1999).

Case Number 19 CR 151

{¶14} Appellant argues that there is no explanation for his guilty plea to the more serious felony offense instead of the lesser misdemeanor offense. Appellant argues that there is no evidence his trial counsel considered the defenses available to him before recommending that he enter a guilty plea. Appellant explains that he, himself, did not consider his available defenses because he was hopeful that he would receive community control. Additionally, Appellant argues that his counsel was ineffective for failing to file a motion for bond. Appellant also contends that the trial court relied on incorrect facts which he believes may have led to a harsher sentence.

{¶15} The state responds that the trial court informed Appellant of his constitutional and nonconstitutional rights, and thus complied with Crim.R. 11. The state acknowledges the trial court stated that it would consider the possibility of release on bond, but that the judge made no promises.

{¶16} Although Appellant's assignment of error relates to his plea, he does not argue that the trial court's Crim.R. 11 plea colloquy was deficient. Instead, he argues his counsel provided ineffective assistance during the time leading up to the plea hearing. The crux of Appellant's arguments appears to be that his trial counsel rushed him into a plea agreement without first conducting a thorough investigation. As a result, he believes his plea was not intelligently, knowingly, and voluntarily entered.

{¶17} Appellant argues that he had an available defense his counsel did not explore before advising him to enter a plea. According to Appellant, an unknown man

and woman approached him with a credit card and asked him to use it to make a purchase. He claims that he did not consider that the card may have been stolen when he complied with their request. He argues that his counsel should have located the man and woman and, presumably, ask them to testify in his defense.

{¶18} Importantly, the "defense" Appellant now discusses was raised for the first time during the sentencing hearing. Assuming Appellant's story can be believed, he did not know the people who allegedly approached him with the stolen credit card. The record is devoid of any evidence that anyone, including Appellant, knew the identity of either the man or woman who allegedly approached him. There is also nothing within the record to demonstrate that Appellant provided any information that would have led counsel to locate these individuals. Thus, counsel's failure to attempt to locate this man and woman cannot constitute deficient performance.

{¶19} Even if such failure could be considered deficient, there is no evidence that these individuals would have provided testimony favorable to Appellant. Again, if Appellant's story is to be believed, these individuals were guilty of theft and would not have any incentive to assist Appellant and subject themselves to criminal charges. Clearly, Appellant cannot demonstrate resulting prejudice.

{¶20} Appellant also argues that trial counsel's advice to plead guilty to the more serious felony instead of the misdemeanor offense was inexplicable, as no competent counsel would offer such advice. However, there is nothing in the record to suggest that the state ever offered to dismiss the felony charge. Counsel was able to secure an agreement where at least one pending criminal count was dismissed. Appellant has not alleged that a credible, valid defense was available to him on either charge. As such,

Appellant cannot demonstrate that counsel's performance in securing the dismissal of his misdemeanor charge was deficient.

{¶21} Next, Appellant argues that counsel's performance was deficient as he failed to correct the judge's misstatement of certain facts during his sentencing hearing. However, since Appellant himself corrected the trial court, there was no need for counsel to act. The following dialogue occurred during the hearing:

> **THE COURT**: [F]rom what I read from the facts of this case in the PSI you broke into somebody's car and stole their credit cards. * * *
>
> **[APPELLANT]**: I didn't break into the car, sir. Somebody approached me with the card and I had bought food stamps off the card.
>
> **THE COURT**: You are just as guilty as whoever broke in the car. You attempted to use it and apparently somebody was successful in --
>
> **[APPELLANT]**: Because if I had known it was stolen, I definitely --
>
> **THE COURT**: How could you not know a credit card with a young lady's name on it is not stolen?
>
> **[APPELLANT]**: It was a lady, a lady and a guy that approached me in Cochran's up there in Youngstown.
>
> **THE COURT**: Well, that's really poor judgment on your part knowing that you are out on judicial release. That's the problem we have with that. I

talked to your attorney about that. I talked to the prosecutor about that. That's the problem I have with this case.

(5/17/19 Probation Violation and Sentencing Hrg. Tr., pp. 6-8.)

{¶22} Because Appellant corrected the trial court's statement of the facts, counsel's failure to also speak cannot constitute deficient performance. We note there is no evidence that the court relied on any erroneous fact in determining Appellant's sentence. Instead, the court relied on Appellant's lengthy criminal record, detailed within the presentence investigation ("PSI"), and the fact that he was on judicial release when he committed the offense at issue.

{¶23} Appellant contends that his counsel was ineffective for failing to file a post-sentence motion to withdraw his plea. However, there is nothing within the record to suggest that Appellant requested his counsel to file a motion.

{¶24} Appellant also argues that his counsel was ineffective for failing to file a motion for bail pre-sentence when the trial court had indicated during the plea hearing that it would consider releasing him on bail.

{¶25} Contrary to Appellant's claims, defense counsel orally moved for Appellant's release on bond during the plea hearing. The trial court indicated that it would consider the motion, but did not know enough about the case at that early stage. Subsequently, on May 2, 2019, defense counsel filed a written motion for bail, which the state opposed. On May 15, 2019, the trial court overruled the motion.

{¶26} There is no evidence to suggest that even if a motion for bond was successful it would have had any effect on the sentencing in this case. Appellant believes

that a successful motion would have increased his chances of receiving a sentence that did not include incarceration. Such argument is tenuous at best.

{¶27} Additionally, under the terms of Appellant's release in case number 15 CR 178 he was clearly told that he would serve the remainder of his original prison term if he violated any term of his community control. Thus, even if the trial court had sentenced him to community control in case number 19 CR 151 for his later crimes, he would still be required to serve the remainder of his four-year prison term ordered in case number 15 CR 178. As such, there appears to be no set of circumstances that would have prevented him from serving a prison sentence.

{¶28} Again, the trial court repeatedly emphasized the fact that Appellant committed the later offense while on judicial release for his earlier crime. The court stated:

> [I]t's very serious when, you know, you convinced the court that, yeah, you are deserving of a second chance and you -- I don't know what you told Judge D'Apolito, but he had some faith in you. He believed that you were worthy of taking a chance on and releasing you back into the public; and, quite frankly, you blew it. I mean, and what you did here is it's -- to risk going back to prison for what you did here is just unbelievable.

(5/17/19 Probation Violation and Sentencing Hrg. Tr., p. 6.)

{¶29} Based on this record, there are no facts that would tend to suggest that counsel's performance fell short or that, but for counsel's alleged errors, the outcome of case number 19 CR 151 would have been different.

{¶30} Accordingly, Appellant's arguments are without merit.

15 CR 178

{¶31} Appellant argues that trial counsel was deficient for instructing him to admit that he had committed a probation violation a little over sixty days after his indictment for the crimes that formed the basis of that violation. Appellant repeats his argument that he had a defense available to the charges in case number 19 CR 151, which served the basis for his probation violation.

{¶32} As previously discussed, Appellant did not present a timely or viable defense. Assuming it was timely and credible, there is nothing to suggest that Appellant was able to provide any information to lead his counsel to locate the individuals he claimed gave him the stolen credit card. Further, even if this story were true, nothing suggests it would constitute a complete defense to the charged offenses.

{¶33} As noted by the trial court, a woman's name was listed on the credit card. While Appellant claims that one of the people who approached him was a woman, he cannot explain why the woman did not use her own card to make the requested purchase. As the trial court pointed out, Appellant knew he was on community control and apparently agreed to use the credit card of someone he did not know to make a purchase. Finally, his story is that this couple were complete strangers to him. Even if, by some slim chance, they could be identified and located, there is no evidence that the man or woman would provide testimony favorable to Appellant since that would subject them to criminal charges, themselves. Again, this story was not raised until sentencing.

{¶34} With no viable defense available, there is nothing of record to suggest that there was any reason to prolong this case. Consequently, there is no evidence to show that, but for the error of counsel as alleged, the result of the case would have been different.

{¶35} Accordingly, Appellant's second and third assignments of error are without merit and are also overruled.

Conclusion

{¶36} Appellant argues that he received ineffective assistance of counsel which led him to prematurely plead guilty in case number 19 CR 151 and admit to a probation violation in case number 15 CR 178. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Robb, J., concurs.

Trapp, 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 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.