[Cite as *State v. McGill*, 2020-Ohio-5177.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 108469
v.	:	
JACQUEZ R. MCGILL,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: October 30, 2020

Cuyahoga County Court of Common Pleas
Case Nos. CR-18-631610-A and CR-18-632809-A
Application for Reopening
Motion No. 541241

Appearances:

Friedman & Gilbert, and Mary Catherine Corrigan, *for appellant*.

RAYMOND C. HEADEN, J.:

{¶ 1} Applicant, Jacquez McGill, seeks to reopen his appeal in *State v. McGill*, 8th Dist. Cuyahoga No. 108469, 2020-Ohio-575. McGill argues that appellate counsel was ineffective for failing to raise an assignment of error

challenging the trial court's denial of his presentence motion to withdraw his guilty pleas. For the following reasons, we deny the application.

Procedural and Substantive History

{¶ 2} McGill was indicted in two cases with serious charges related to a drive-by shooting and another shooting incident outside of a convenience store. McGill ultimately pleaded guilty to two counts of felonious assault and one count of having weapons while under disability in one case and attempted murder, felonious assault, tampering with evidence, having weapons while under disability, and carrying concealed weapons in the other case. The plea agreement also included pleading guilty to various firearm specifications in both cases.

{¶ 3} A sentencing hearing was convened on March 25, 2019. At the start of the hearing, McGill orally moved to withdraw his guilty pleas in these cases. The court heard arguments from both sides, including the reasons why McGill wanted to withdraw his guilty pleas. The trial court denied the motion and proceeded to sentence McGill to an aggregate 15-year prison sentence.

{¶ 4} McGill appealed his convictions to this court, assigning two errors for review. He claimed that his guilty pleas were not entered knowingly, intelligently, and voluntarily when he did not know he was not eligible for judicial release. *McGill*, 8th Dist. Cuyahoga No. 108469, 2020-Ohio-575, at ¶ 8. He further claimed that his pleas were void because he was not informed of his right to testify in his own defense. *Id*. This court, on February 20, 2020, overruled the assignments of error and affirmed McGill's convictions.

{¶ 5} On September 20, 2020, McGill, through counsel, filed the instant application for reopening, arguing a single proposed assignment of error. The state failed to timely respond in opposition.

Law and Analysis

{¶ 6} App.R. 26(B) provides a criminal defendant with an opportunity to assert a claim of ineffective assistance of appellate counsel. App.R. 26(B)(5) states that "[a]n application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." However, the rule includes a strict deadline that states that the application must be filed "within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time." App.R. 26(B)(1). "The 90-day requirement in the rule is 'applicable to all appellants[.]'" *State v. LaMar*, 102 Ohio St.3d 467, 2004-Ohio-3976, 812 N.E.2d 970, ¶ 9, quoting *State v. Winstead*, 74 Ohio St.3d 277, 278, 658 N.E.2d 722 (1996).

{¶ 7} McGill must establish a colorable claim of ineffective assistance of counsel in order to prevail on an application for reopening. *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998). He must set forth "[o]ne or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation." App.R. 26(B)(2)(c). The test for ineffective assistance of appellate counsel requires a defendant to show (1) that counsel's performance was deficient, and (2) that the

deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). Under this test, McGill must demonstrate that appellate counsel was deficient for failing to raise the issues he has presented in the application and that there is a reasonable probability of success had these issues been raised on appeal. *Spivey* at 25.

{¶ 8} McGill acknowledges that his application is untimely. McGill asserts that there is good cause for the untimely filing. The only allegation in the application going to good cause states: "While Mr. McGill's Application for Reopening was initially due on May 20, 2020, Mr. McGill respectfully submits that there is good cause for the delay in filing. The financial and logistical complications of COVID-19 rendered him unable to retain and communicate with new counsel." Further, the affidavit attached to the application does not support any claimed difficulty in communication between lawyer and client or offer support for the claims alleged in the application that consequences stemming from the COVID-19 Pandemic made timely filing the motion impossible. In fact, the affidavit does not include any statements going to good cause.

{¶ 9} This unsupported assertion does not include any specific details showing how McGill was prevented from filing the application or hiring, coordinating, or communicating with counsel. The bald assertion that he was unable to do so, without the barest of support, is insufficient to meet the applicant's obligation of establishing good cause.

{¶ 10} However, in *State v. Howard*, 8th Dist. Cuyahoga Nos. 107467, 107468, and 107469, 2019-Ohio-4739, this court applied the Supreme Court of Ohio tolling order, *In re Tolling of Time Requirements Imposed by Rules Promulgated by the Supreme Court and Use of Technology*, 03/27/2020 Administrative Actions, 2020-Ohio-1166, to an application for reopening. This tolling order stays the time for any filing required by the Ohio Rules of Appellate Procedure for the duration of the order. McGill's application is timely filed when the tolling order is applied to this case.

{¶ 11} The appellate decision was journalized on February 20, 2020. The tolling order's effect began on March 9, 2020. Therefore, 18 days elapsed between the journalization of this court's opinion and the effective date of the order. The tolling order expired on July 30, 2020. McGill filed his application to reopen on September 20, 2020. A span of 51 days elapsed between the expiration of the order and the filing of the application. Therefore, a total of 69 days can properly be counted against the 90-day period within which McGill had to timely file his application. Therefore, the application is timely.

{¶ 12} McGill raises a single proposed assignment of error: "The Trial Court erred abused [sic] its discretion in denying appellant's pre-sentence motion to withdraw plea." McGill argues that appellate counsel was ineffective for not arguing that his oral presentence motion to withdraw his guilty pleas was denied in error, or was not given full and fair consideration prior to being denied.

{¶ 13} Crim.R. 32.1, provides a limited means of seeking to withdraw a guilty plea. It 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.

{¶ 14} A presentence motion to withdraw a guilty plea is to be liberally granted. *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992). That does not mean all such motions shall be granted. "A defendant does not have an absolute right to withdraw a plea prior to sentencing, and it is within the sound discretion of the trial court to determine what circumstances justify granting such a motion." *State v. Westley*, 8th Dist. Cuyahoga No. 97650, 2012-Ohio-3571, ¶ 6, citing *Xie* at 527. When faced with such a motion, the trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for withdrawal of the plea. *Xie* at paragraph one of the syllabus.

> A trial court does not abuse its discretion in overruling a motion to withdraw: (1) where the accused is represented by highly competent counsel, (2) where the accused was afforded a full hearing, pursuant to Crim. R. 11, before he entered the plea, (3) when, after the motion to withdraw is filed, the accused is given a complete and impartial hearing on the motion, and (4) where the record reveals that the court gave full and fair consideration to the plea withdrawal request.

State v. Peterseim, 68 Ohio App.2d 211, 428 N.E.2d 863 (8th Dist.1980), paragraph three of the syllabus. "A mere change of heart regarding a guilty plea and the possible sentence is insufficient justification for the withdrawal of a plea." *State v. Bloom*, 8th Dist. Cuyahoga No. 97535, 2012-Ohio-3805, ¶ 13.

{¶ 15} Here, the record discloses that McGill was represented by competent counsel and was afforded a full and thorough Crim.R. 11 plea colloquy. McGill does not argue otherwise. McGill attacks the third and fourth factors in the above test, claiming that the trial court did not conduct a hearing on the motion to withdraw and did not give the oral motion full and fair consideration.

{¶ 16} McGill's oral motion to withdraw was based on his claimed misunderstanding of the plea agreement. He asserted that he wanted to withdraw his plea because he thought the agreement would result in only an aggregate ten-year sentence. The following hearing was had addressing McGill's oral motion to withdraw his guilty pleas.

> DEFENSE COUNSEL: In any event, he indicates that he believes the prosecutor has been — has improperly and wrongfully changed the nature of the original plea offer in this case, and he should be allowed to vacate the plea.
>
> * * *
>
> MCGILL: Yes, on record. You said the mark, the plea agreement, was just ten years. It's on record for January 22nd. It's in my court dockets and on the transcript.
>
> THE COURT: It is not on the docket –
>
> MCGILL: It says –
>
> THE COURT: Don't talk when I am talking. You think that I told you on the record there was a ten-year agreed sentence?
>
> MCGILL: Yes.
>
> THE COURT: That is not my recollection. Anything else that you wanted to say, Mr. McGill?

MCGILL: No. That was all.

THE COURT: [Prosecutor], on the January 22nd trial date, the journal does reflect the State's plea offer was placed on the record and that the Defendant requests new counsel.

[Prosecutor], do you have in your notes the plea offer? It's your recollection that you placed a plea offer on the record, and that the minimum jumping off point was ten years?

PROSECUTOR: That I would take back any request to my supervisor starting with a ten-year sentence.

THE COURT: Thank you very much. So as Mr. McGill is not actually questioning any constitutional validity or any challenges to his Criminal Rule 11 plea colloquy, my recollection of the plea — the trial date of January 22nd is the focus was Mr. McGill was unhappy with his attorney, [prior defense counsel], and that the State did place the terms of the plea on the record but that there was no agreed sentence. I assigned new counsel, [defense counsel].

Mr. McGill, the State has never been under any requirement to negotiate with you. And I remember — I know that at your plea hearing this past week, March 18th, I went over in great detail that the range was 10 to 17 years, and that I would not promise you any date within that time frame. So I am going to deny your motion to withdraw your guilty plea on both cases.

(Tr. 58-62.)

{¶ 17} There are three places in the record where McGill's understanding of the plea agreement could be manifested.

{¶ 18} The first instance was on January 22, 2019, the scheduled day of trial and shortly before new counsel was appointed to represent McGill at his request. The following exchange was had in open court.

THE COURT: Can you please put the terms of the plea as it stands right now on the record[?]

PROSECUTOR: Yes, Your Honor. In regards to case 631610, the case is marked to Count 1, attempted murder with a 3-year firearm specification. Count 3, felonious assault with a 3-year firearm specification. Count 4, tampering with evidence. Count 6, having weapons under disability. Count 8, carrying concealed weapon. No contact with the victim, pay restitution, forfeit all items seized with his other case, 632809.

In regards to 632809, the case is marked to Count 1, felonious assault with a 3 and 5-year gun specification. Count 3, felonious assault with a 3 and 5-year gun specification. Count 5, weapons under disability with a forfeiture of weapon. Counts 1 and 2 have a forfeiture of weapon specification as well. No contact with the victim, pay restitution, as with the other case 631610.

After talking with my supervisor, it is also part of our case that we would also entertain other requests regarding the minimum sentence.

THE COURT: [Prosecutor], for case 632809, do any of these counts merge?

PROSECUTOR: The counts that are in the plea agreement are counts in the indictment in general.

THE COURT: Let's go over as it stands in the plea agreement.

PROSECUTOR: Count 1 and Count 3 deal with two different victims and I don't believe they would merge for purposes of sentencing.

THE COURT: And do the 5-year firearm specifications, do they have to be run consecutive to each other?

PROSECUTOR: Yes.

THE COURT: Same question for case 631610. Do any of these counts merge for purpose of sentencing?

PROSECUTOR: Your Honor, I believe the attempted murder Count 1, and Count 3 felonious assault, would merge. It is the same victim.

THE COURT: At that point the State would in all likelihood elect to choose Count 1 for sentencing?

PROSECUTOR: Yes, Your Honor.

THE COURT: Thank you very much. [Defense counsel], is this your understanding of the plea as it stands?

DEFENSE COUNSEL: Thank you, Your Honor, may it please the court. What [the prosecutor] put on the record is fair and accurate. Those are the discussions we have had.

I never asked officially for a mark because of the 10[-]year minimum that was told to me. My client did not want that as far as plea negotiations go, so at this point in time my client, you can inquire of him, but he is not willing to agree to anything close to 10 years, which [is] why I did not ask for a formal mark request.

It's my understanding at this time, this is what the mark is on the case. My client has not given me authorization to ask for anything else, and he would not take this mark at this time. Thank you.

THE COURT: Thank you very much. Mr. McGill, have you talked with your lawyer about this plea that's been offered to you?

MCGILL: Yes, I have, Your Honor.

THE COURT: Do you understand the plea that's been offered to you?

MCGILL: Yes, I do.

THE COURT: Would you like to accept or reject this offer?

MCGILL: No, I would like to reject the offer.

(Tr. 4-7.)

{¶ 19} It must be noted that this is the plea discussion that McGill relied on when arguing his motion, and McGill rejected any plea offer outlined at this hearing.

{¶ 20} A second plea offer was placed on the record on March 18, 2019, after the court appointed new counsel.

> PROSECUTOR: Thank you, Your Honor. So in regards to case 631610, the State is offering a plea of Count 1, attempted murder with a firearm specification of three years; Count 3, felonious assault, with a three[-]year firearm specification; Count 4, tampering with evidence; Count 6, having weapons while under disability; Count 8, carrying concealed weapon.
>
> As part of that plea deal he would agree to have no contact with the victim, to pay any restitution, to forfeiture all items seized, and it would be packaged with his case 632809.
>
> In case 632809 the State is willing to offer a plea deal of Count 1, felonious assault with the three[-] and five[-]year firearm specifications; Count 3, felonious assault, with the three[-] and five [-]year firearm specifications; Count 5, having weapons under disability.
>
> In this case he also agrees to have no contact with the victims, to pay restitution, if there is any, and it's packaged with this case, 631610.
>
> As part of this plea deal the State would agree to a sentencing range of 10 to 17 years.
>
> That is what the State is offering at this point.
>
> * * *
>
> DEFENSE COUNSEL: Yes, Judge. Judge, I didn't specifically give a break down of the plea offer like that to my client. What I indicated to him is that there was a sentencing range that the State would agree to, which was 17 – 10 years up to 17 years, within your discretion. I don't think at that point when they made that offer this morning that they specifically stated what the counts were he would have to plead to in order to get in the sentencing range referred to.
>
> THE COURT: And quite honestly, the way that these counts would break down, I'm at 17 years on firearm specs alone, without any

time on the underlying offenses. So I don't know how I would ever get to 10, based off of this plea that's been offered.

PROSECUTOR: We would — so this mark was put in prior to. And when we had originally put this mark in it was agreed that we would entertain any offer, with the minimum years of ten, ten years. So that's why the counts are — read what they do with the firearm specifications. That was approved by our supervisor this morning to offer the range of 10 to 17 years, and we would have to go back and rework some of these specifications, we just haven't done that.

THE COURT: But the counts would remain the same?

PROSECUTOR: Yes, the underlying counts.

THE COURT: So Mr. McGill, do you understand the plea that's been offered to you?

MCGILL: I mean, not actually, Your Honor. Not actually. But —

THE COURT: Okay. Well, let me go over this with you, so that you can understand what's being offered to you. And you can have a moment with your lawyer to decide what you would like to do. And then we can move forward.

So, you have two cases with me. Now, your first case is 631610. You are charged in a five[-]count indictment with eight different counts. If you were to plead guilty the State would accept from you a plea of guilty to Count 1, attempted murder, this is a felony of the first degree, with the three[-]year firearm specification. Count 3 is a felonious assault charge, a felony of the second degree, with the three[-]year firearm specification. Counts 4 and 6 are both low tier felonies of the third degree. Count 4 is tampering with evidence, Count 6 is having a weapon under disability, and Count 8 is carrying concealed weapon, felony of the fourth degree. So you would plead guilty to these five counts, the State would dismiss three of the counts, as well as dismiss the one[-]year firearm specifications attached to Counts 1 and 3. Count 1 is punishable from 3 to 11 years in prison, and there is that three[-]year firearm specification. Count 3 is punishable from 2 to 8 years in prison, and there's also that 3[-]year firearm specification. Your felonies of the third degree are punishable from 9 to 36 months in prison, and the felony of the fourth degree is punishable from 6 to 18 months in prison.

Do you understand all of that?

MCGILL: Yes, Your Honor.

THE COURT: Okay. In case 632809, you are charged in a five [-] count indictment, but the State would accept a plea from you on three of the counts and agree to dismiss the other two. They would accept a plea of guilty from you on Count 1, felonious assault. This is a felony of the second degree. It has with it that three[-]year firearm specification, as well as the five year drive by firearm specification. Count 3 is the same thing. This is because these are the same charges but they have two victims. Chaz Gray and James Gray, III. And then the last count is having a weapon under disability, this is a felony of the third degree, that can be punished from — sorry, 9 to 36 months in prison.

Do you understand this?

MCGILL: Yes, Your Honor.

THE COURT: Okay. So, the State has agreed to rework some of those specifications if you would plead guilty so that it could be — I could then choose a sentence with a minimum of no less than 10 years, and a maximum of no more than 17 years. How they would rework that specification I can't tell you right now, but it would allow me to sentence within that range. Do you understand that?

MCGILL: Yes, Your Honor.

(Tr. 19-26.)

{¶ 21} Later, during the same hearing, the following exchange occurred:

THE COURT: All right. In the time since we have been on the record the State of Ohio clarified the terms of the plea offer and informed Court and defense counsel how they would amend the indictment so that this Court could get within that sentencing range of 10 to 17 years. The defense has had the opportunity to speak with his client about the specifics of the plea.

Is that correct, [defense counsel]?

[DEFENSE COUNSEL]: Yes, Your Honor.

THE COURT: Okay. And what are we doing? How are we moving forward today?

[DEFENSE COUNSEL]: Judge, I think based on my conversation — well, he wants to accept the plea, but he — I think he needs to understand that even without the plea that the State is offering that whatever time he would receive is flat time. And even though there's a range that the State is offering and the Court is accepting, that's still flat time too, it just depends on the number.

* * *

THE COURT: Okay. So that is correct, Mr. McGill. You would do — if I sentence you to ten years, you would serve the ten years. If I sentenced you to 12, you would do 12. And then anywhere between 10 to 17, you would serve that definite time, and that's what we mean by flat time. You would also get credit for the days you spent here already on this case, but that's what we mean by flat time.

Do you understand that?

THE DEFENDANT: Yes, I understand, Your Honor. I just — I just thought that the only time that would be mandatory would be the mandatory time. I don't have an understanding of how the whole sentence is mandatory.

THE COURT: It becomes mandatory — it doesn't really become mandatory. The firearm specification is the mandatory portion of the time. And then under the statute a certain percentage of the first [-]degree felony or the high level felony offenses become mandatory for purposes of judicial release.

But because this case, if it resolves under a plea negotiated bargain, you would agree that you would serve a prison sentence ranging from 10 to 17 years, and whatever term that I sentence you on it is your agreement to serve that term.

You get the benefit of all these other charges and firearm specifications being dismissed in exchange for a specific sentence.

And that's what I would impose at the time of your sentencing.

You kind of can't have it both ways.

* * *

[DEFENSE COUNSEL]: I was explaining to him, Mr. McGill, that one of the ways you could get the minimum of ten years is if he pled to the two firearm specifications, which is six years, he plead to the attempted murder, and you gave him four years on that, and everything else would run concurrent.

THE COURT: That is correct.

[DEFENSE COUNSEL]: If you did receive the minimum. And it would work the same way if she gave you more than the minimum. Eventually all this other stuff is going to run concurrent with whatever the number is.

So what do you want to do, Mr. McGill?

THE DEFENDANT: All right.

THE COURT: Would you like to accept the State's plea offer, Mr. McGill?

THE DEFENDANT: Yes.

(Tr. 34-39.)

{¶ 22} The plea discussion on the record did not include a ten-year agreed sentence. Further, McGill indicated he understood the proposed agreements. He specifically indicated that he understood the plea agreement he accepted and the trial court's explanation that he would receive a prison sentence of between 10 and 17 years. He subjectively and objectively understood that his guilty pleas would result in a sentence of no less than 10 years and no more than 17 years.

{¶ 23} During the withdrawal hearing, the trial court correctly outlined the plea agreement that appellant accepted, which included an agreed sentencing range of between 10 and 17 years. The transcript of the February 22 hearing did not

support McGill's assertion that there was any agreement to a ten-year sentence. Although McGill sites the February 22 hearing for support of his claim, that hearing did not indicate a ten-year agreed sentence, and he rejected any plea offer that was put forward that day. In short, appellant had no basis to conclude that his plea agreement included an agreed ten-year sentence, and any claim that it did or he understood that it did is contradicted by the record in this case. The trial court confirmed that appellant understood the outlined plea agreement. The court offered further explanation when appellant claimed he did not understand until appellant indicated he did understand. There is no support for appellant's stated reason for wanting to withdraw his guilty pleas. In fact, the stated reason is contradicted by the record.

{¶ 24} Appellant's application argues that the hearing was not a full and fair consideration of the motion. Contrary to McGill's argument, the trial court conducted a hearing on the motion commensurate with McGill's stated reasons for withdrawal.

> [A] trial court must conduct a hearing to determine whether there is a "reasonable and legitimate" basis for the guilty plea withdrawal motion. [*Xie*, 62 Ohio St.3d 521, 584 N.E.2d 715 (1992)]. However, "Ohio courts have previously held that a trial court inviting and hearing oral arguments on a motion to withdraw a guilty plea at the sentencing hearing, immediately before sentence is imposed, can constitute a full and fair hearing on that motion."

State v. Hairston, 10th Dist. Franklin Nos. 07AP-160 and 07AP-161, 2007-Ohio-5928, ¶ 27, quoting *State v. Griffin*, Cuyahoga No. 82832, 2004-Ohio-1246, ¶ 18, citing *State v. Holloman*, 2d Dist. Greene No. 2000CA82, 2001 Ohio App. LEXIS

2755 (June 22, 2001). "The scope of a hearing on a defendant's motion to withdraw a plea should reflect the substantive merit of the motion; bold assertions without evidentiary support do not merit the scrutiny that substantiated allegations would merit." *State v. Paulino*, 8th Dist. Cuyahoga No. 104198, 2017-Ohio-15, ¶ 13, citing *State v. Hall*, 8th Dist. Cuyahoga No. 55289, 1989 Ohio App. LEXIS 1602, 2-3 (Apr. 27, 1989).

{¶ 25} Everything the trial court recounted about its recollection of the plea hearing was correct. The basis for McGill's motion was contradicted by the record. The trial court personally addressed McGill and allowed him to state the reasons he wished to withdraw his plea. The only basis offered was appellant's alleged understanding of a rejected plea agreement. The trial court correctly determined that appellant's alleged understanding of the plea agreement was contrary to that stated on the record and to appellant's own admissions made during the plea hearings. The trial court gave full and fair consideration to appellant's motion and conducted a hearing commensurate with the stated reason for withdrawal.

{¶ 26} Here, the trial court determined that McGill did not present a reasonable and legitimate basis for the withdrawal of his pleas. Nothing in the record indicates that this was an abuse of discretion. Accord *Hairston*, 10th Dist. Franklin Nos. 07AP-160, 07AP-161, 2007-Ohio-5928, at ¶ 28; *State v. Johnson*, 2016-Ohio-8494, 79 N.E.3d 1202, ¶ 10 (10th Dist.).

{¶ 27} Therefore, McGill has not demonstrated that appellate counsel was ineffective for failing to raise this issue. McGill's application does not present a colorable claim of ineffective assistance of appellate counsel.

{¶ 28} Application denied.

RAYMOND C. HEADEN, JUDGE

PATRICIA ANN BLACKMON, P.J., and
ANITA LASTER MAYS, J., CONCUR