[Cite as *State v. Cecil*, 2009-Ohio-4931.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-018**
- vs -	:	
CHARLES L. CECIL,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 05 CR 000097.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Charles L. Cecil, pro se, P.I.D. A492-036, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030-8000 (Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} This matter is submitted to this court on the record and the briefs of the parties. Appellant, Charles L. Cecil, appeals the judgment entered by the Lake County Court of Common Pleas. The trial court denied Cecil's postsentence motion to withdraw his guilty plea.

{¶2} On April 26, 2005, Cecil was indicted on three counts, including two counts of robbery, in violation of R.C. 2911.01(A)(2) and second-degree felonies, and one count of grand theft, in violation of R.C. 2913.02(A)(1) and a fourth-degree felony.

{¶3} Cecil pled guilty to one count of robbery, in violation of R.C. 2911.01(A)(2), a second-degree felony. Upon recommendation of the state, the trial court dismissed the remaining counts of the indictment.

{¶4} On September 2, 2005, Cecil was sentenced to a five-year prison term for his robbery conviction.

{¶5} On January 11, 2008, Cecil filed a motion to withdraw his guilty plea. Cecil attached an unofficial copy of the transcript of his change of plea hearing to his motion. The state filed a response to Cecil's motion to withdraw his guilty plea.

{¶6} In July 2008, while his motion to withdraw his guilty plea was still pending before the trial court, Cecil filed a "motion to compel coupled with a motion to take judicial notice." In this combined motion, Cecil asked the trial court to rule on his motion to withdraw his guilty plea. In addition, he requested the trial court take judicial notice of the Supreme Court of Ohio's decision in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*"). He claimed the indictment was defective because it did not contain the applicable mental state of the offense for which he was convicted. The state filed a brief in opposition to Cecil's combined motion, wherein it argued that the Supreme Court of Ohio had limited the holding of *Colon I* to pending cases in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon II*").

{¶7} On January 26, 2009, in a single judgment entry, the trial court denied Cecil's motion to withdraw his guilty plea, as well as his motion to take judicial notice of *Colon I*. Cecil has timely appealed the trial court's judgment entry to this court.

{¶8} Cecil raises two assignments of error. His first assignment of error is:

{¶9} "Defendant-Appellant[']s indictment is fatally defective where it fails to include an essential element of the crime charged in violation of the Ohio and The United States Constitution[s]."

{¶10} In *Colon I*, the Supreme Court of Ohio held, "[w]hen an indictment fails to charge a mens rea element of a crime and the defendant fails to raise that defect in the trial court, the defendant has not waived the defect in the indictment." *State v. Colon*, 2008-Ohio-1624, syllabus.

{¶11} Upon reconsideration, in *Colon II*, the Supreme Court of Ohio held, "the rule announced in *Colon I* is prospective in nature and applies only to those cases pending on the date *Colon I* was announced." *State v. Colon*, 2008-Ohio-3749, at ¶5. Therefore, *Colon I* "cannot be applied retroactively *** since a '"new judicial ruling may not be applied retroactively to a conviction that has become final, i.e., where the accused has exhausted all of his appellate remedies."'" *State v. Nicholas*, 11th Dist. Nos. 2008-P-0080 & 2008-P-0082, 2009-Ohio-2953, at ¶14, quoting *Colon II*, 2008-Ohio-3749, at ¶4, quoting *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592, at ¶6. The Second Appellate District has interpreted the Supreme Court of Ohio's holding in *Colon II* to mean that the action must have been "pending on direct appeal." *State v. Mitchell*, 2d Dist. No. 22814, 2009-Ohio-3124, at ¶9. We agree with this interpretation.

{¶12} In this matter, Cecil did not appeal the judgment entry of sentence. Thus, he exhausted all his appellate remedies as he did not have a direct appeal pending at the time *Colon I* was announced.

{¶13} Cecil claims his case was "pending" because the trial court had not ruled on his postsentence motion to withdraw his guilty plea when *Colon I* was announced. We disagree. If we were to adopt Cecil's position, a criminal defendant could be

encouraged to continuously file various motions with the trial court, potentially availing that individual to all subsequent legal rulings by the Supreme Court of Ohio, regardless of any limiting language regarding the prospective nature of the holding. This would be inconsistent with the case law limiting such holdings to those cases pending on direct review. *State v. Mitchell*, 2009-Ohio-3124, at ¶9. See, also, e.g. *State v. Silsby*, 119 Ohio St.3d 370, 2008-Ohio-3834, at ¶18. (Citations omitted.)

{¶14} Cecil's first assignment of error is without merit.

{¶15} Cecil's second assignment of error is:

{¶16} "Appellant was Constitutionally deprived of [his] 6th and 14th Amendment rights to effective assistance of counsel where counsel failed to adequately conduct, prior to pressuring Appellant to enter a guilty plea, a preliminary investigation of the charges, in violation of [the] Ohio and United States Constitutions."

{¶17} Cecil argues he should have been permitted to withdraw his guilty plea because he received ineffective assistance of counsel.

{¶18} "Pursuant to App.R. 9, the appellant has a duty to file a transcript of all portions of proceedings necessary for the court to consider the appeal. When an appellant fails to provide a complete transcript, or those portions that support the claimed error, the reviewing court has no choice but to presume the regularity of the proceedings and affirm the judgment of the trial court." *State v. Stislow*, 11th Dist. No. 2005-L-207, 2006-Ohio-4168, at ¶24. (Citations omitted.)

{¶19} In this matter, Cecil attached an unofficial copy of the transcript of the change of plea hearing to his motion to withdraw his guilty plea. This copy was not "certified," as required by App.R. 9(B). However, the state has not objected to this transcript and even cites to it in its appellate brief. Accordingly, for the purposes of this

appeal, we will consider the transcript in the record, even though it is not properly certified. See, e.g. *Aurora v. Sea Lakes, Inc.* (1995), 105 Ohio App.3d 60, 63, fn. 1.

{¶20} Crim.R. 32.1 provides a means for a criminal defendant 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." The burden is on the defendant to show the existence of the alleged manifest injustice. *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus.

{¶21} An appellate court is limited in its review of a trial court's decision regarding a motion to withdraw a guilty plea to determine whether the trial court abused its discretion. (Citations omitted.) *State v. Gibbs* (June 9, 2000), 11th Dist. No. 98-T-0190, 2000 Ohio App. LEXIS 2526, at *6-7. The term "abuse of discretion" implies that the court's decision was arbitrary, unreasonable, or unconscionable. (Citations omitted.) *State v. Adams* (1980), 62 Ohio St.2d 151, 157-158.

{¶22} In *State v. Bradley*, the Supreme Court of Ohio adopted the following test to determine if counsel's performance is ineffective: "[c]ounsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance." *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus, adopting the test set forth in *Strickland v. Washington* (1984), 466 U.S. 668. Moreover, "'a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *** If it is easier to dispose of an ineffectiveness

claim on the ground of lack of sufficient prejudice, *** that course should be followed.'" Id. at 143, quoting *Strickland*, 466 U.S. at 697.

{¶23} To demonstrate prejudice in the context of a guilty plea, the appellant must show "there is a reasonable probability that, but for counsel's error, [he] would not have pleaded guilty." *State v. Brunkala*, 11th Dist. Nos. 2007-L-184 & 2007-L-185, 2008-Ohio-3746, at ¶11. (Citation omitted.)

{¶24} Cecil contends his trial counsel failed to advise him that he had a limited right to appeal his conviction due to the fact he pled guilty.

{¶25} We note Cecil did not raise this argument in his motion to withdraw his guilty plea filed with the trial court. This court has held that issues that have not been raised at the trial court level cannot be raised for the first time on appeal. *State v. Marquez*, 11th Dist. No. 2007-A-0085, 2008-Ohio-5324, at ¶33, citing *State v. Gegia*, 157 Ohio App.3d 112, 2004-Ohio-2124, at ¶26. However, despite this procedural infirmity, we will briefly address Cecil's argument on its merits.

{¶26} The following colloquy occurred at the change of plea hearing:

{¶27} "THE COURT: Do you further understand if you went to trial and were found guilty of this charge, any of these charges, you would have the right to appeal that guilty finding? But by entering a plea of guilty here today, you are giving up that right to appeal the guilty finding, conviction. Do you understand that?

{¶28} "[Cecil]: Yes sir."

{¶29} In addition, Cecil testified that he was satisfied with trial counsel's representation.

{¶30} Finally, we note Cecil filed his motion to withdraw his guilty plea more than two years after his plea was entered and he was sentenced by the trial court. "An

undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of a motion under Crim.R. 32.1 is a factor adversely affecting the credibility of the movant and militating against the granting of the motion." *State v. Smith*, 49 Ohio St.2d 261, paragraph three of the syllabus. The fact that Cecil did not assert this argument in a timely fashion weighs against his credibility in asserting that he was not properly advised on this issue.

{¶31} Cecil has not demonstrated that his trial counsel's performance was deficient for failing to advise him of his appellate rights relative to a guilty plea.

{¶32} Cecil also argues that his trial counsel's performance was deficient for failing to adequately investigate the language of the indictment.

{¶33} Cecil's motion to withdraw his guilty plea was based on an allegation that he received a "misrepresented degree of benefit" from his plea agreement, in that two of the charged offenses were allied offenses of similar import, so he could not have been convicted of both of them. At the change of plea hearing, Cecil stated that he was entering the plea voluntarily and that there had not been any promises made. In addition, he stated he was satisfied with counsel's representation. Moreover, we note that Cecil was also charged with theft, which was also dismissed pursuant to the plea agreement. Therefore, even if his argument is accepted, he did receive an additional benefit by entering the guilty plea to one count of robbery.

{¶34} On appeal, Cecil claims his counsel's performance was defective for failing to investigate the indictment, an argument related to his motion to take judicial notice of *Colon I*. As the state notes, Cecil is asking this court to declare his trial counsel's performance in 2005 deficient because he failed to anticipate the Supreme

Court of Ohio's ruling in *Colon I*, which occurred in 2008. Accordingly, we cannot conclude counsel's representation was deficient.

{¶35} Further, Cecil has failed to demonstrate that he would not have pled guilty to one count of robbery without these perceived instances of deficient representation. *State v. Brunkala*, supra, at ¶11. (Citation omitted.) Thus, he has not shown that he was prejudiced. Id.

{¶36} Finally, we again emphasize that since Cecil filed a postsentence motion to withdraw his guilty plea, he was required to demonstrate a manifest injustice. Crim.R. 32.1. Cecil does not contend that he is actually innocent of the robbery offense or advance any other claim that rises to the level of a manifest injustice.

{¶37} Cecil's second assignment of error is without merit.

{¶38} The judgment of the Lake County Court of Common Pleas is affirmed.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.