

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

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| STATE OF OHIO, | : | OPINION |
| Plaintiff-Appellee, | : | |
| - vs - | : | CASE NO. 2010-L-014 |
| JAMES C. CASKEY, | : | |
| Defendant-Appellant. | : | |

Criminal Appeal from the Court of Common Pleas, Case No. 08 CR 000664.

Judgment: Affirmed.

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

James C. Caskey, pro se, PID: 563-137, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030 (Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, James C. Caskey, appeals the judgment entered by the Lake County Court of Common Pleas. The trial court denied Caskey’s postsentence motion to withdraw his guilty plea without a hearing.

{¶2} As a result of conduct that occurred on October 15, 2008, a six-count indictment was issued against Caskey. Caskey was charged with two counts of operating a vehicle under the influence of alcohol and/or a drug of abuse (“OVI”) in

violation of R.C. 4511.19(A)(1)(a) and two counts of OVI in violation of R.C. 4511.19(A)(2). All four OVI charges were indicted as fourth-degree felonies, since Caskey had three or more OVI convictions in the previous six years. In addition, all four OVI counts contained a specification pursuant to R.C. 2941.1413, alleging that Caskey had been convicted of five or more prior OVI offenses in the previous 20 years. Caskey was also charged with driving under suspension, in violation of R.C. 4510.11(A) and a first-degree misdemeanor, and driving under financial responsibility law suspension or cancelation, in violation of R.C. 4510.16(A) and a first-degree misdemeanor.

{¶3} On February 9, 2009, Caskey pled guilty to one count of OVI, in violation of R.C. 4511.19(A)(1)(a) and a fourth-degree felony, with the accompanying specification pursuant to R.C. 2941.1413, i.e., that he had been convicted of five or more prior OVI offenses in the previous 20 years. Upon request of the state, the trial court dismissed the remaining counts of the indictment.

{¶4} On March 10, 2009, the trial court sentenced Caskey to a 24-month prison term for his OVI conviction and a one-year prison term for the specification pursuant to R.C. 2941.1413. The trial court ordered these terms served consecutively, resulting in an aggregate three-year prison term.

{¶5} On December 15, 2009, Caskey filed a motion to withdraw his guilty plea, to which he attached his own affidavit, asserting various instances of perceived ineffective representation by his trial counsel. The state filed a response in opposition to Caskey's motion. Thereafter, the trial court denied Caskey's motion to withdraw his guilty plea without a hearing.

{¶6} Caskey has timely appealed the trial court’s judgment entry denying his motion to withdraw his guilty plea. On his notice of appeal, Caskey indicated that he requested a complete transcript be prepared for purposes of this appeal. However, no transcript was prepared, presumably because the trial court did not conduct a hearing on Caskey’s motion to withdraw his guilty plea. We note that Caskey did not file a direct appeal from the trial court’s judgment entry of sentence; therefore, the record before this court does not contain a transcript of the change of plea or sentencing hearings.¹ Notwithstanding the lack of transcripts, we believe the record before this court contains sufficient information to reach the merits of Caskey’s arguments on appeal.

{¶7} Caskey raises five assignments of error for our consideration. We address his assigned errors out of numerical order. His first assignment of error is:

{¶8} “The trial court erred in denying appellant’s motion to dismiss charges and/or withdraw invalid guilty plea, where the court lacked subject matter jurisdiction to accept the guilty plea as charged.”

{¶9} 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.

1. In its judgment entry denying the motion to withdraw the guilty plea, the trial court noted that Caskey did not attempt to file a transcript of the change of plea or sentencing hearings for the trial court to consider when ruling on the motion.

{¶10} 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. An abuse of discretion is the trial court's "failure to exercise sound, reasonable, and legal decision-making." *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶11} The trial court denied Caskey's motion to withdraw his guilty plea without a hearing. However, "[a] trial court need not hold an evidentiary hearing on a post-sentence motion to withdraw a guilty plea if the record indicates the movant is not entitled to relief and the movant has failed to submit evidentiary documents sufficient to demonstrate a manifest injustice." *State v. Mays*, 174 Ohio App.3d 681, 2008-Ohio-128, at ¶6. (Citation omitted.) See, also, *State v. Gibson*, 11th Dist. No. 2007-P-0021, 2007-Ohio-6926, at ¶33. (Citation omitted.)

{¶12} In this matter, the guilty plea form signed by Caskey clearly demonstrates that Caskey was informed of his rights and knowingly, voluntarily, and intelligently entered his plea. As the trial court noted, the guilty plea form states:

{¶13} "I, James Caskey, the defendant in the above captioned case, hereby state that my counsel has explained to me the facts and circumstances surrounding my plea, and the Court and my counsel have informed me of the charge against me and the penalty provided by law for that charge.

{¶14} "****

{¶15} “I am voluntarily pleading guilty of my own free will. I understand that this written plea of guilty constitutes an admission which may be used against me at a later trial. By pleading guilty I admit committing the offense and will tell the judge the facts and circumstances of my guilt.

{¶16} “***

{¶17} “No threats have been made against me. No promises other than those which are part of this plea agreement have been made.”

{¶18} Finally, we note Caskey filed his motion to withdraw his guilty plea more than ten months after his plea was entered and over nine months after 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 Caskey did not assert his arguments in support of his motion to withdraw his guilty plea in a timely fashion weighs against his credibility regarding those issues.

{¶19} Upon reviewing the entire record, we conclude the trial court did not abuse its discretion in determining that Caskey did not demonstrate a manifest injustice that would warrant the withdrawal of his guilty plea.

{¶20} Caskey’s first assignment of error is without merit.

{¶21} Caskey’s fourth assignment of error is:

{¶22} “Appellant’s trial counsel’s assistance fell below an objective standard of reasonably effective assistance under the *Strickland* standard and Article I, Section 10 of the Ohio Constitution.”

{¶23} In his appellate brief, Caskey suggests “this Court should conduct an evidentiary hearing regarding post conviction relief” to consider “evidence dehors the record.” First, we note that, pursuant to R.C. 2953.21(A)(1)(a), a petition for postconviction relief must be filed with the “court that imposed sentence,” i.e., the trial court. Second, Caskey did not file a petition for postconviction relief; instead, he filed a motion to withdraw his guilty plea. Finally, this court would not be permitted to consider any evidence submitted in such a hearing, as this court is limited to the record that was before the trial court. See *State v. Goodnight*, 11th Dist. No. 2008-L-029, 2009-Ohio-2951, at ¶43. (Citations omitted.) Accordingly, we decline Caskey’s request for an evidentiary hearing.

{¶24} 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.

{¶25} 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.)

{¶26} In his affidavit in support of his motion to withdraw his guilty plea, Caskey advanced several instances of alleged ineffective representation by his trial counsel.

{¶27} Several of Caskey’s claimed instances concern police statements of the witnesses and the report of the arresting officer. Caskey has attached copies of these documents to his appellate brief. However, these documents were not before the trial court, thus we will not consider them. See *State v. Goodnight*, 2009-Ohio-2951, at ¶43. (Citations omitted.) Furthermore, a cursory review of these documents does not demonstrate that the performance of Caskey’s trial counsel was deficient for failing to challenge them via a motion to suppress evidence or cross-examination at trial.

{¶28} In addition, Caskey contends his trial counsel was ineffective for failing to advise him that “a No Contest Plea would qualify him for an automatic appeal.” As the trial court noted, this is an incorrect assertion of law. Thus, there was no demonstration that counsel’s performance was deficient in this regard.

{¶29} Caskey makes the general assertion that his counsel failed to file even one motion. Without more, such as a contention of a specific motion that trial counsel should have filed and an argument concerning the likelihood of success of said motion, Caskey has not demonstrated he was denied the effective assistance of counsel.

{¶30} Caskey asserts his counsel was deficient for advising him that an appeal of the length of his sentence was pointless. He claims that the defendant in *State v. Mariano*, 11th Dist. No. 2008-L-134, 2009-Ohio-5426, received a shorter sentence for a more severe OVI offense. As the trial court noted, any claim of ineffective assistance of

counsel must relate to Caskey's decision to enter his guilty plea. See *State v. Brunkala*, 2008-Ohio-3746, at ¶11. (Citation omitted.) Since he had not been sentenced at the time he entered his guilty plea, any perceived ineffective representation concerning advice as to whether to appeal the sentence is not relevant.

{¶31} Finally, Caskey argues his trial counsel was ineffective for advising him to enter a guilty plea instead of proceeding to trial. The decision to advise a criminal defendant to enter a guilty plea is a strategic decision. We note strategy decisions should not be subject to second guessing, and ““a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.”” *State v. Ogletree*, 11th Dist. No. 2005-P-0040, 2006-Ohio-6107, at ¶64, quoting *State v. Mason*, 82 Ohio St.3d at 157-158, quoting *Strickland*, 466 U.S. at 689. In this matter, Caskey was facing six charges in the indictment. As a result of entering a guilty plea, all but one of those charges were dismissed. Thus, Caskey has not demonstrated that his trial counsel's performance was deficient. Further, Caskey has not demonstrated that he was prejudiced by this advice—to wit: that he would have been acquitted had the matter proceeded to trial.

{¶32} Caskey's fourth assignment of error is without merit.

{¶33} Caskey's third assignment of error is:

{¶34} “The indictment which uses prior uncounseled misdemeanor[s] to enhance charges to felon[ies] based on prior conviction[s] violates appellant's due process of law.”

{¶35} The Supreme Court of Ohio has held: “[w]hen existence of a prior conviction does not simply enhance the penalty but transforms the crime itself by

increasing its degree, the prior conviction is an essential element of the crime and must be proved by the state.” *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, at ¶8, citing *State v. Allen* (1987), 29 Ohio St.3d 53, 54. Accordingly, since five prior OVI convictions are elements of the instant felony charge, the state bore the burden of proving the existence of those convictions beyond a reasonable doubt had the matter proceeded to trial. *Id.*, citing *State v. Henderson* (1979), 58 Ohio St.2d 171, 173.

{¶36} In *State v. Neely*, this court noted the law regarding a subsequent challenge of a prior conviction:

{¶37} “In general, a past conviction cannot be collaterally attacked in a later case. However, there is a limited right to collaterally attack a conviction when the state attempts to use the past conviction to enhance the penalty of a later criminal offense. A conviction obtained against a defendant who is without counsel, or its corollary, an uncounseled conviction obtained without a valid waiver of the right to counsel, has been recognized as constitutionally infirm. *State v. Brandon* (1989), 45 Ohio St.3d 85, 86; *Nichols v. United States* (1994), 511 U.S. 738.” *State v. Neely*, 11th Dist. No. 2007-L-054, 2007-Ohio-6243, at ¶12.

{¶38} Generally, when a defendant challenges the constitutional validity of a prior conviction, a burden-shifting exercise occurs. *Id.* at ¶15, citing *State v. Brandon*, 45 Ohio St.3d at 88. The Supreme Court of Ohio has explained this exercise as follows:

{¶39} “For purposes of penalty enhancement in later convictions under R.C. 4511.19, after the defendant presents a prima facie showing that the prior convictions were unconstitutional because the defendant had not been represented by counsel and had not validly waived the right to counsel and that the prior convictions had resulted in

confinement, the burden shifts to the state to prove that the right to counsel was properly waived.” *State v. Thompson*, 121 Ohio St.3d 250, 2009-Ohio-314, syllabus, explaining *State v. Brooke*, 2007-Ohio-1533, paragraph one of the syllabus.

{¶40} This matter is distinguishable from *State v. Thompson* and *State v. Brooke*. In those cases, the defendant challenged the prior convictions in a pretrial motion to dismiss. *State v. Thompson*, 2009-Ohio-314, at ¶3; *State v. Brooke*, 2007-Ohio-1533, at ¶3. In this matter, Caskey is challenging his prior convictions in a postsentence motion to withdraw his guilty plea. As this court noted in *State v. Sartain*, the burden-shifting exercise set forth above does not strictly apply to a situation where a defendant raises the alleged error in a postsentence motion to withdraw his or her guilty plea, since the defendant still has the ultimate burden to demonstrate a manifest injustice. *State v. Sartain*, 11th Dist. No. 2007-L-167, 2008-Ohio-2124, at ¶27, citing *State v. Smith*, *supra*.

{¶41} Moreover, the only evidence Caskey advanced in this matter is his personal affidavit, in which he asserts “[c]ounsel failed to contest two prior uncounseled O.V.I. convictions which elevated this offense.” Thus, even if we applied the burden-shifting exercise as outlined in *State v. Thompson*, Caskey’s claim would still fail, as he did not set forth a prima facie showing that his prior OVI convictions were uncounseled and he did not waive counsel in those cases. Notably, Caskey does not even specify which of his prior OVI convictions were uncounseled.

{¶42} The trial court did not abuse its discretion by denying Caskey’s motion to withdraw his guilty plea based on his assertion that two of his prior OVI convictions were uncounseled.

{¶43} Caskey's third assignment of error is without merit.

{¶44} Caskey's second and fifth assignments of error are:

{¶45} "[2.] Appellant's indictment was obtained without probable cause in violation of the 4th and 14th Amendments of the United States Constitution and Article I, Section 14 of the Ohio Constitution.

{¶46} "[5.] The state's deliberate deception by the presentation of materially false evidence to the grand jury without regard to the independence and truth seeking function violates due process."

{¶47} In his second and fifth assignments of error, Caskey contends there were constitutional infirmities regarding the indictment and the grand jury proceedings. This court has held: "when a defendant enters a guilty plea and thereby admits that he is in fact guilty of the charged [offense], he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *State v. Fitzpatrick*, 11th Dist. No. 2009-L-030, 2010-Ohio-710, at ¶27. (Citations omitted.) As Caskey entered a guilty plea, he has waived his ability to challenge the perceived constitutional irregularities of the indictment and grand jury proceedings.

{¶48} Caskey's second and fifth assignments of error are without merit.

{¶49} Upon our initial review of this matter, we had a question concerning the trial court's imposition of a 24-month prison sentence for Caskey's underlying OVI conviction. Caskey was convicted of one count of OVI, in violation of R.C. 4511.19(A)(1)(a) and a fourth-degree felony. Neither party raised the issue of the length of Caskey's sentence in their original appellate brief. Thus, we issued a

judgment entry permitting the parties to file supplemental briefs on this issue. See *State v. Blackburn*, 11th Dist. No. 2001-T-0052, 2003-Ohio-605, at ¶45, citing *State v. Peagler* (1996), 76 Ohio St.3d 496, 499.

{¶50} In response to our judgment entry, Caskey filed a supplemental brief containing the following supplemental assignment of error:

{¶51} “The trial court erred in sentencing appellant to 24 months for a 4th degree felony, and 1 year under the O.V.I. specification where appellant was not informed of the mandated mandatory, consecutive sentence.”

{¶52} In its supplemental brief, the state notes that R.C. 2929.14 provides, in part: “[i]n addition to the mandatory prison term, if the offender is being sentenced for a fourth degree felony OVI offense, the court, notwithstanding division (A)(4) of this section, may sentence the offender to a definite prison term of not less than six months and not more than thirty months[.]” Thus, the trial court did not err in sentencing Caskey to a 24-month prison term.

{¶53} In his supplemental brief, Caskey asserts additional argument pertaining to the voluntariness of his guilty plea. However, as this court expressly stated in our judgment entry, “[t]he parties’ supplemental briefs shall be limited to the issue of the length of Caskey’s sentence and any proposed remedy the parties advocate this court take with respect to this issue.” Accordingly, we will not consider the additional arguments set forth in Caskey’s supplemental brief.

{¶54} Caskey’s supplemental assignment of error is without merit.

{¶55} The judgment of the Lake County Court of Common Pleas denying Caskey’s motion to withdraw his guilty plea is affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only in part, and dissents in part, with Concurring in Judgment Only/Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., concurs in judgment only in part, and dissents in part, with Concurring in Judgment Only/Dissenting Opinion.

{¶56} I concur in judgment only with respect to the majority's ruling on assignments of error one through five. However, I would have considered the issues raised in appellant's supplemental brief on the merits. To that extent, I dissent.