

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

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-T-0117
LANCE POUGH,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 00 CR 280.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Lance Pough, pro se, PID# 532-77-060, Federal Correctional Inst Williamsburg, P.O. Box 340, Salters, SC 29590 (Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Lance Pough, appeals from the Judgment of the Trumbull County Court of Common Pleas, denying Pough’s motions for resentencing and clarification of sentence. The first issue to be decided by this court is whether a defendant can be given jail time credit for time served on a separate charge. The second issue is whether a defendant sentenced to serve jail time on a state charge, to run concurrent with jail time on a separate federal charge, may be released into state

custody if the federal sentence ends prior to the state sentence. For the following reasons, we affirm the decision of the court below.

{¶2} On May 5, 2000, the Trumbull County Grand Jury returned a secret indictment against Pough for his role in the 1998 death of Braderick McMillan. Count one of the indictment charged Pough with one count of Aggravated Murder, in violation of R.C. 2903.01(A), including three death penalty specifications under R.C. 2929.04(A)(2), (3), & (8), and a firearm specification under R.C. 2941.145(A). The second count of the indictment charged Conspiracy to Commit Aggravated Murder, in violation of R.C. 2923.01(A)(1) and R.C. 2903.01(A), including another firearm specification under R.C. 2941.145(A).

{¶3} Pursuant to the terms of a plea agreement, Pough entered a guilty plea to an amended version of count two of the indictment on May 16, 2000. As amended, count two charged appellant with Complicity to Commit Murder, a violation of R.C. 2923.03(A)(1) and 2903.02(A), along with a firearm specification, in violation of R.C. 2941.145(A). The plea agreement stated that Pough would be given “credit for time served” and that, “if the Defendant is released from federal detention prior to serving at least 17 years, the Defendant must be returned to a State facility to serve the remainder of the sentence.” Upon a motion by the State, the trial court nolleed count one of the indictment.

{¶4} On November 15, 2000, Pough was sentenced to fifteen years to life in prison, along with three years for the firearm specification, to be served concurrently with the sentence Pough was serving in federal prison on Federal Case No. 4:98-CR-234. He was given credit for time served from May 10, 2000, to November 15, 2000.

{¶5} Pough appealed to this court and argued that his plea was not knowing and voluntary and his trial counsel was ineffective for failing to file a motion to suppress. On December 13, 2002, in *State v. Pough*, 11th Dist. No. 2000-T-0151, 2002-Ohio-6927, this court found Pough's guilty plea was valid and affirmed the trial court.

{¶6} On July 15, 2003, Pough filed a petition for postconviction relief along with motions to stay postconviction proceedings, for the appointment of counsel, for grand jury minutes, and for the production of trial court docket sheets. The trial court denied Pough's motions and dismissed the petition in a judgment entry dated August 27, 2003. On July 23, 2004, this court held that Pough's petition for postconviction relief was untimely and that he did not meet the requirements of R.C. 2953.32(A). *State v. Pough*, 11th Dist. No. 2003-T-0129, 2004-Ohio-3933.

{¶7} On October 28, 2009, Pough filed a Motion for Sentencing Clarification. On November 4, 2010, Pough filed a motion titled "Trial court breached/violated the plea agreement by the court's conduct in the written sentence entry journal" with the trial court.

{¶8} On November 4, 2010, the trial court issued a Judgment Entry, finding these motions to be without merit and denying the motions.

{¶9} Pough timely appeals and asserts the following assignments of error:¹

{¶10} "[1.] The common pleas Court committed error when it denied Petitioner/appellant's motion requesting a new sentencing hearing or re-sentencing nunc pro tunc.

1. Although Pough designates his unnumbered arguments as "claims", we have labeled them as assignments of error for the sake of clarity.

{¶11} “[2.] The Common Pleas Court committed error and abused it’s [sic] discretion by denying appellant’s claim that the trial court breached/violated the plea agreement by the court’s conduct in the written sentence entry journal.

{¶12} “[3.] The Trial court committed error by denying appellant’s request for a sentence clarification in connection to the plea agreement and the written sentence judgment entry.

{¶13} “[4.] The Common Pleas Court was in error for denying appellant’s claim that his

{¶14} trial [attorney] Rich Jr. was ineffective for advising him he could withdraw his plea if the court sentences him to something different than what he agreed to in the plea.”

{¶15} Although not labeled as such, it appears that Pough’s motion titled “Trial court breached/violated the plea agreement by the court’s conduct in the written sentence entry journal” is a motion to withdraw his guilty plea under Crim.R. 32.1. “We review a trial court’s denial of a motion to withdraw a guilty plea pursuant to the abuse of discretion standard.” *State v. Griffey*, 11th Dist. No. 2009-P-0077, 2010-Ohio-6573, at ¶16 (citations omitted).

{¶16} 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.”

{¶17} “The phrase ‘manifest injustice’ has been ‘variously defined,’ however, ‘it is clear that under such standard, a postsentence withdrawal motion is allowable only in

extraordinary cases.” *Conneaut v. Donofrio*, 11th Dist. No. 2008-A-0072, 2009-Ohio-2947, at ¶11, citing *State v. Smith* (1977), 49 Ohio St.2d 261, 264 (citation omitted).

{¶18} As Pough’s first three assignments of error all relate to an alleged conflict between the sentence given by the court and Pough’s plea agreement, we will consider these errors jointly.

{¶19} Pough first argues that he must be allowed to withdraw his guilty plea because the sentence given to him by the court was contradictory to the terms of the plea agreement he had signed. He asserts that the court made two errors in the sentencing entry, which contradict the terms of the plea agreement and therefore improperly “modified” the terms of the plea agreement. First, Pough asserts that he believed he would be given credit for time he had served in federal prison prior to being indicted on the state Aggravated Murder charges. He asserts that he should have been given credit for “11 months and 16 days *** for the time he spent in Federal custody prior to being indicted” on the state charges.

{¶20} The State argues that the federal charges were unrelated to the state Murder charge and therefore, it would be improper to give Pough credit for the time he served in federal custody prior to the state indictment.

{¶21} Regarding jail time credit, such credit “is appropriate only when the facts and circumstances giving rise to the incarceration are the result of the charge for which the offender is eventually sentenced.” *State v. Struble*, 11th Dist. No. 2005-L-115, 2006-Ohio-3417, at ¶11. An offender is not entitled to “jail-time credit for any period of incarceration which arose from facts which are separate and apart from those on which his current sentence is based.” *Id.*

{¶22} In this case, there is nothing in the record, including the written plea, that indicates Pough was told he would receive credit towards his state sentence from time served on his federal sentence. Pough served approximately one year in federal prison prior to being indicted on the state charges. Pough does not assert, nor does the record reflect, that the state and federal charges arose from the same facts, as required to give jail time credit. In addition, the trial court properly stated in its Entry on Sentence that Pough would receive credit starting May 10, 2000, the date Pough was formally arrested for the state charges, and running through the date of sentencing on the state charges, November 15, 2000. The trial court's decision was not only in compliance with the law, but also did not conflict with any promises that were made to Pough.

{¶23} Second, Pough argues that the State, through the plea agreement, promised Pough would be transferred to state prison if he was released from federal prison "before seventeen years," while the Entry on Sentence issued by the trial court states that he will be returned to state prison if released "prior to eighteen years." Pough argues that because of this, he believed his sentence was only seventeen years, not eighteen, and, therefore, his plea was not given knowingly.

{¶24} Based on the record before the court, Pough had knowledge of, or should have had knowledge of, the fact that his term of imprisonment would be a total term of eighteen years to life. The plea agreement stated that a fifteen-year to life sentence for Complicity to Commit Murder, as well as a three-year sentence for the gun specification, is "presumed necessary and mandatory". See R.C. 2929.13(F). In addition, during the plea hearing, Pough stated that he understood that an eighteen-year to life sentence was mandatory. The Entry on Sentence simply confirms that if Pough was released

from federal prison prior to serving eighteen years, he would serve the remainder of his sentence in state prison. Based on his signature on the plea agreement and his statements during the plea hearing, it was clearly conveyed to Pough that he would serve a mandatory term of eighteen years to life on his state convictions.

{¶25} Although Pough seems to assert that he should be released from federal prison after seventeen years, nothing in the plea agreement he signed stated that such a release would occur. Moreover, even if Pough were to be released from federal prison early or prior to the end of the state sentence, Pough would be required to serve the remainder of his state sentence. See *State ex rel. Gray v. Karnes*, 10th Dist. No. 10AP-789, 2010-Ohio-5364, at ¶6 (when a federal sentence is reduced subsequent to state court sentencing, the shortened federal sentence “does not provide a basis for reduction of the state court sentence so that it corresponds to the federal release date”).

{¶26} Moreover, although Pough raises separate issues related to the voluntariness of his plea, this court previously found that Pough’s plea was knowingly and intelligently given in our decision in *Pough*, 2002-Ohio-6927, at ¶45 (“[t]he record before us indicates that appellant knowingly, intelligently, and voluntarily entered, and the trial court accepted, a plea of guilty at the May 15, 2000 plea hearing”).

{¶27} Based on the foregoing, Pough’s argument that he did not have knowledge that he would serve eighteen years is without merit.

{¶28} In addition, we note that Pough filed his motion almost ten years after he entered his guilty plea. “[A]n 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. Nicholas*, 11th Dist. No. 2009-P-0049, 2010-Ohio-1451, at ¶17, citing *Smith*, 49 Ohio St.2d 261, at paragraph three of the syllabus. When considering this, in addition to the factors discussed above, we cannot find that the trial court abused its discretion in failing to grant Pough’s motion to withdraw his guilty plea.

{¶29} Pough also argues that, even if his plea was valid, the trial court should resentence him due to the “errors” in sentencing discussed above.

{¶30} As we have found no errors exist related to the jail time credit and the transfer of Pough from federal to state prison, there are no grounds to remand to the trial court for resentencing.

{¶31} Pough also claims that his co-defendant, Arthur Bell, was granted a new sentencing hearing. However, this assertion has no impact on whether Pough should be granted a new hearing, as it is unrelated to Pough’s guilty plea and sentence. There is no evidence as to the circumstances surrounding Bell’s resentencing. Moreover, the record of Bell’s case is not before this court, nor was it before the trial court, and it cannot be considered in this case.

{¶32} The first through third assignments of error are without merit.

{¶33} In his fourth assignment of error, Pough argues that his trial counsel was deficient because counsel informed Pough that he could withdraw his guilty plea if the trial court sentenced him to a sentence different than the one agreed to in the plea agreement.

{¶34} A properly licensed attorney is presumed to have rendered competent assistance. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. “In the context of a guilty plea, the standard of review for ineffective assistance of counsel is whether: (1)

counsel's performance was deficient; and (2) the defendant was prejudiced by the deficient performance in that there is a reasonable probability that, but for counsel's error, the defendant would not have pled guilty." *State v. DelManzo*, 11th Dist. No. 2009-L-167, 2010-Ohio-3555, at ¶33 (citation omitted). "The defendant carries the burden to prove ineffective assistance of counsel." *State v. O'Connell*, 11th Dist. No. 2010-L-030, 2011-Ohio-652, at ¶38 (citation omitted).

{¶35} "The mere fact that, if not for the alleged ineffective assistance of counsel, the defendant would not have entered a guilty plea is *not* sufficient to establish the requisite connection between the guilty plea and the ineffective assistance." *State v. Madeline*, 11th Dist. No. 2000-T-0156, 2002-Ohio-1332, 2002 Ohio App. LEXIS 1348, at *10, citing *State v. Sopjack*, 11th Dist. No. 93-G-1826, 1995 Ohio App. LEXIS 5572, at *11. "Rather, ineffective assistance of trial counsel is found to have affected the validity of a guilty plea when it precluded a defendant from entering his plea knowingly and voluntarily." *Id.* (citation omitted).

{¶36} Pough contends that counsel made promises that Pough could withdraw his plea in order to convince him to plead guilty. He asserts that he was "urged" by counsel to take the plea and that he "was balking at the plea" in the courtroom.

{¶37} As discussed throughout this opinion, Pough is unable to prove that his plea was anything other than voluntarily. The trial court did not sentence Pough to something other than what he agreed to in his plea. The court properly sentenced Pough pursuant to the plea agreement and the mandatory sentence required by law. Since Pough received exactly the sentence he agreed to in the plea agreement, there was no basis for him to withdraw his plea. His assertions that his attorney coerced him

into making a guilty plea are unsupported by the record. See *State v. Kapper* (1983), 5 Ohio St.3d 36, 38 (“[d]efendant’s own self-serving declarations or affidavits alleging a coerced guilty plea are insufficient to rebut the record on review which shows that his plea was voluntary”). Therefore, Pough is unable to prove that his trial counsel was deficient.

{¶38} The fourth assignment of error is without merit.

{¶39} For the foregoing reasons, the Judgment of the Trumbull County Court of Common Pleas, denying Pough’s motions for resentencing and clarification of sentence, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.