

[Cite as *State v. Reese*, 2017-Ohio-2847.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

DAYWON L. REESE

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. Craig R. Baldwin, J.

Case No. CT2017-0015

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Muskingum County Court
of Common Pleas, Case No. CR2015-0267

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

May 15, 2017

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Hoffman, J.

{¶1} Defendant-appellant Daywon L. Reese appeals the February 16, 2017 Judgment Entry entered by the Muskingum County Court of Common Pleas denying his motion to withdraw plea. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On January 15, 2016, Appellant entered a plea of guilty to one count of possession of drugs (cocaine), a felony of the first degree, in violation of R.C. 2925.11(A); three counts of possession of drugs (oxycodone), felonies of the fifth degree, in violation of R.C. 2925.11(A); one count of possession of drugs (alprazolam), a misdemeanor of the first degree, in violation of R.C. 2925.11(A); and one count of possession of drugs (marijuana), a misdemeanor of the fourth degree, in violation of R.C. 2925.11(A).

{¶3} On February 14, 2016, Appellant moved the trial court to withdraw his plea, asserting he was denied the effective assistance of counsel creating a manifest miscarriage of justice. The trial court denied the motion via Judgment Entry of February 16, 2017.

{¶4} Appellant appeals, assigning as error:

I. APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DUE TO DEFENSE COUNSEL'S ERRONEOUS ADVICE THAT HE ENTER GUILTY PLEAS TO ENHANCED-DEGREE FELONIES FOR POSSESSION OF DRUGS (COCAINE) BASED ON GROSS WEIGHT THAT INCLUDED OTHER MATERIAL, INSTEAD OF THE

WEIGHT OF ACTUAL COCAINE, IN VIOLATION OF HIS RIGHT TO DUE PROCESS.

II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT [SIC] MOTION TO WITHDRAW HIS GUILTY PLEA WHEN A CLEAR MANIFEST INJUSTICE HAD BEEN SHOWN BY THE RECORD AND DOCUMENTATION.

{¶15} We note, this matter comes before this Court pursuant to the accelerated calendar and App. Rule 11.1. Accordingly, it is sufficient compliance with Appellate Rule 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusionary form.

I, II.

{¶16} Appellant's assigned errors raise common and interrelated issues; therefore, we will address the arguments together.

{¶17} Appellant maintains he was denied effective assistance of counsel in entering his plea to the charge of possession of cocaine; therefore, the trial court erred in denying his motion to withdraw his plea.

{¶18} Our standard of review for ineffective assistance claims is set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Ohio adopted this standard in the case of *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, we must determine whether counsel's assistance was ineffective; i.e., whether counsel's performance fell below an objective standard of reasonable representation and was violative of any of his or her essential duties to the

client. If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. This requires a showing there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different. *Id.*

{¶19} Trial counsel is entitled to a strong presumption all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie* (1998), 81 Ohio St.3d 673, 675, 693 N.E.2d 267. In addition, the United States Supreme Court and the Ohio Supreme Court have held a reviewing 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.” *Bradley* at 143, 538 N.E.2d 373, quoting *Strickland* at 697, 104 S.Ct. 2052.

{¶10} Crim.R. 32.1 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.” Accordingly, “[a]fter a defendant has been sentenced, a court may permit withdrawal of a plea only to correct a manifest injustice.” *State v. Caraballo*, 17 Ohio St.3d 66, 67 (1985). Further, “[t]he burden of establishing the existence of such injustice is upon the defendant.” *Id.*

{¶11} Under Ohio law, “[a] trial court is vested with the sound discretion to grant or deny a post-sentence motion for withdrawal of a plea.” *State v. Glenn*, 11th Dist. No. 2003-L-022 , 2004-Ohio-2917, ¶ 27. Thus, this court's review of a trial court's denial of a

motion to withdraw a guilty plea “is limited to a determination of whether the trial court abused its discretion.” *Id.* at ¶ 28.

{¶12} Appellant submits he was improperly convicted of possession of cocaine at the enhanced penalty level, citing *State v. Gonzales*, ___ Ohio St.3d ___. ___ N.E.3d ___, 2016-Ohio-8319 (*Gonzales I.*)

{¶13} In *Gonzales I*, the Ohio Supreme Court held, in prosecuting cocaine-possession offenses under R.C. 2925.11(C)(4)(b) through (f) involving mixed substances, the state must prove the weight of the actual cocaine, excluding the weight of any filler materials, to meet the statutory threshold.

{¶14} On reconsideration in *State v. Gonzales*, ___ Ohio St.3d ___, ___ N.E.3d ___, 2017 Ohio -777, the Supreme Court vacated *Gonzales I*, holding the entire “compound, mixture, preparation, or substance,” including any fillers that are part of the usable drug, must be considered for the purpose of determining the appropriate penalty for cocaine possession under R.C. 2925.11(C)(4).

{¶15} Appellant’s assigned errors are overruled on the basis of this Court’s opinion in *State v. Davidson*, Muskingum App. No. CR2015-0229, ___ Ohio ___, and the Ohio Supreme Court’s opinion in *Gonzalez II*, *supra*.

{¶16} The judgment of the Muskingum County Court of Common Pleas is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Baldwin, J. concur