[Cite as *State v. Ward*, 2014-Ohio-426.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

State of Ohio — Court of Appeals No. OT-13-001

Appellee — Trial Court No. 08CR120

v.

Kai Ward — **DECISION AND JUDGMENT**

Appellant — Decided: February 7, 2014

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney,
and Andrew M. Bigler, Assistant Prosecuting Attorney,
for appellee.

K. Ronald Bailey, for appellant.

* * * * *

JENSEN, J.

{¶ 1} This is an appeal from the December 12, 2012 judgment of the Ottawa County Court of Common Pleas denying appellant's, Kai Ward, amended motion for postconviction relief. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} On August 21, 2008, the Ottawa County Grand Jury issued a 13 count indictment against appellant. After he initially pled not guilty to the indictment, appellant entered a plea agreement with the state of Ohio, and agreed to enter guilty pleas to certain counts in the indictment. On July 30, 2009, appellant entered guilty pleas to three counts of disseminating matter harmful to juveniles in violation of R.C. 2907.31(A)(1), a felony of the fifth degree. Appellant also pled guilty to two counts of gross sexual imposition with a child victim less than 13 years of age in violation of R.C. 2907.05(A)(4), a felony of the third degree. Pursuant to the plea agreement, the state agreed to dismiss the remaining eight counts in the indictment, which included five sex offense counts and three drug-related counts.

{¶ 3} On January 8, 2010, appellant was sentenced to 12 months imprisonment for each of the fifth degree felonies and five years imprisonment for each of the third degree felonies. The five-year terms were ordered to be served consecutively, but concurrent to the 12-month terms for a total of eleven years imprisonment. Appellant filed a notice of appeal on February 4, 2010. We affirmed the trial court's decision in *State v. Ward*, 6th Dist. No. OT-11-018, 2012-Ohio-1996.

{¶ 4} On July 7, 2010, while his appeal was pending, appellant filed a petition for postconviction relief with the trial court. Appellant argued that he was denied effective assistance of trial counsel because counsel allegedly promised appellant he would receive probation by accepting the state's plea offer. Appellant further claimed his counsel was ineffective for failing to object to the prosecutor's statements at sentencing, which,

appellant argued, breached the plea agreement because the state allegedly agreed in the plea agreement not to recommend a sentence or object to appellant's request for probation. The trial court denied appellant's petition, finding that the matters raised by appellant could have been argued on direct appeal.

{¶ 5} On August 2, 2010, appellant filed an amended petition for postconviction relief. In the amended petition, appellant made arguments similar to those raised in his initial petition, but further argued that relief was proper pursuant to the United States Supreme Court's decision in *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). Appellant supported his amended petition with his affidavit, the affidavits of his prior defense attorneys, and the January 8, 2010 sentencing hearing transcript.

{¶ 6} In response to appellant's amended petition, the state argued that it did not breach the terms of the plea agreement as alleged by appellant. The state also indicated that it did not make a recommendation at sentencing, but instead recited statements already contained in the presentence investigation report before the court.

{¶ 7} A hearing was held on the amended petition on March 28, 2011. Appellant testified that attorney Andrew Bucher represented him in the matter through the plea hearing, at which point attorney James Reinheimer represented appellant at sentencing. Appellant also indicated that he only completed school through the second grade and that he could not write, but was improving at his reading skills.

{¶ 8} Appellant further testified that attorney Buchner advised him to enter a guilty plea and that appellant would be sentenced to probation. Appellant stated that Bucher also advised him not to inform the judge about this agreement. Appellant asserted that he did not understand that the trial court could sentence him to 11 years of imprisonment.

{¶ 9} On cross-examination at the hearing, the state questioned appellant about the plea agreement. In response, appellant admitted that the trial judge explained the maximum penalty for each count appellant was pleading guilty to, as well as the fact the judge could sentence appellant to any amount of time in that range.

{¶ 10} The affidavits of appellant's defense counsel were also admitted into evidence during the hearing on appellant's amended petition. Attorney Bucher stated that pursuant to the oral agreement with the state, the prosecutor agreed not to make a sentencing recommendation and not to object to the defense's recommendation of community control. Bucher asserted, "As a result of the plea deal entered into with the [state], it was my opinion that the Defendant was in a good position to receive community control, but it was not certain."

{¶ 11} Attorney Reinheimer's affidavit stated that he represented appellant during sentencing. Reinheimer indicated that the prosecutor advised the court to consider appellant's prior charges involving minors and that the victim of appellant's crimes was seven years old. Additionally, Reinheimer also attested to the fact that the state indicated to the court that appellant would persist in such criminal conduct.

{¶ 12} On May 25, 2011, the trial court denied appellant's amended petition for postconviction relief. The court found that appellant's claims for ineffective assistance of counsel and cruel and unusual punishment were barred by res judicata. Appellant timely appealed this decision.

{¶ 13} On appeal, this court reversed, in part, the trial court's decision. We explained,

> Upon review, we find that as to the argument that the state failed to adhere to the oral plea agreement, and that counsel was ineffective for failing to object, the court abused its discretion by summarily dismissing the argument as being barred by res judicata. The affidavits provided in support of the petition were not part of the trial proceedings and could not have been included in the record before this court on direct appeal. *State v. Ward*, 6th Dist. No. OT-11-018, 2012-Ohio-1996.

{¶ 14} On remand, the trial court denied appellant's amended motion for postconviction relief. The court stated, "assuming *arguendo*, that counsel was deficient for failing to object, Defendant has failed to demonstrate that the outcome would have been different." (Emphasis sic.) *State v. Ward*, Ottawa C.P. No. 08CR120 (Dec. 12, 2012). Appellant filed the instant appeal and sets forth two assignments of error for our review.

First Assignment of Error

{¶ 15} In his first assignment of error, appellant contends:

> THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT'S PETITION FOR POST CONVICTION RELIEF, WHERE GUILTY PLEA WAS INDUCED BY PROSECUTING ATTORNEY'S PROMISE NOT TO OPPOSE PROBATION BUT PROSECUTOR BREACHED THE AGREEMENT.

{¶ 16} Under this assignment of error, appellant argues that the prosecuting attorney for the state breached the terms of the plea agreement. Appellant contends that his plea agreement was conditioned on the state's promises to (a) dismiss several counts of the indictment; (b) not to make a recommendation of prison at sentencing; and (c) not to object to appellant's recommendation of community control. Appellant further asserts that the prosecuting attorney "induced" him into pleading guilty to certain counts in the indictment, because the prosecution allegedly failed to fulfill its promises to appellant. However, despite evidence showing the state would dismiss certain counts in the indictment, appellant fails to indicate where the prosecution made such promises.

{¶ 17} The appropriate standard for our review of a decision denying a petition for postconviction relief pursuant to R.C. 2953.21 is an abuse of discretion. "In the interest of providing finality to judgments of conviction, courts construe the post-conviction relief allowed under R.C. 2953.21(A)(1) narrowly." *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 47, citing *State v. Steffen*, 70 Ohio St.3d 399, 639

N.E.2d 67 (1994). Furthermore, "when a trial court rules on a petition for postconviction relief after a hearing, an appellate court will give deference to the trial court's findings of fact." *Id.*

{¶ 18} The Supreme Court of Ohio has held that "the term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Wilmington Steel Prods., Inc. v. Cleveland Elec. Illuminating Co.*, 60 Ohio St.3d 120, 122, 573 N.E.2d 622 (1991). When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *In re Jane Doe 1*, 57 Ohio St.3d 135, 138, 566 N.E.2d 1181 (1991). The fact that we may have reached an opposite result will not justify our reversing the trial court's decision. *Wilmington Steel Prods.*, at 122.

{¶ 19} Furthermore, the Ohio Supreme Court has held that

> [a] plea bargain itself is contractual in nature and subject to contract law standards. In the process of determining whether disputed plea agreements have been formed or performed, courts have necessarily drawn on the most relevant body of developed rules and principles of private law, those pertaining to the formation and interpretation of commercial contracts.

State v. Dye, 127 Ohio St.3d 357, 2010-Ohio-5728, 939 N.E.2d 1217, ¶ 21. In regard to the validity of plea agreements, Ohio courts echo the sentiment of the United States Supreme Court, holding that "when a plea rests in any significant degree on a

promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at ¶ 22 (citations omitted).

{¶ 20} In determining the contents of a contractual agreement, the parol evidence rule states that "absent fraud, mistake or other invalidating cause, the parties' final written integration of their agreement may not be varied, contradicted or supplemented by evidence of prior or contemporaneous oral agreements, or prior written agreements." *Galmish v. Cicchini*, 90 Ohio St.3d 22, 27, 734 N.E.2d 782 (2000). To this end, we have held that "if a contract is unambiguous, a court may not use extrinsic evidence to interpret the agreement." *Lindsley v. Roe*, 6th Dist. No. L-10-1243, 2011-Ohio-3235, ¶ 30.

{¶ 21} In the instant case, our review of both the transcript from appellant's change of plea hearing and the finalized plea bargain contained in the record do not support appellant's argument that the trial court abused its discretion when it found that the state did not breach the plea agreement.

{¶ 22} According to the record, appellant entered into a written plea agreement with the state and agreed to withdraw his plea of not guilty and entered guilty pleas to Counts 3, 4, 5, 8, and 10 contained in the indictment. This written plea agreement, signed and acknowledged by appellant, appellant's counsel, and the state, also stated, "No promises have been made except as part of this agreement." The agreement further stated that the state would dismiss Counts 1, 2, 6, 7, 9 11, 12, and 13 at the time of sentencing. No evidence exists in either the transcript from the change of plea hearing or the final plea agreement that the state agreed not to make a recommendation of prison at

sentencing, or that it agreed not to object to appellant's recommendation of community control. Moreover, the only objection appellant raised during the change of plea hearing was in reference to potential charges that may arise from evidence contained on a computer confiscated from appellant.

{¶ 23} Based on the statements contained in the written plea agreement, the transcript from the change of plea hearing, and applicable law, the record before this court indicates that the trial court had sufficient evidence before it to find that the state did not breach the plea agreement.

{¶ 24} For the foregoing reasons, we find that the trial court did not abuse its discretion in denying appellant's amended petition for postconviction relief based on the prosecution's alleged breach of the plea agreement. Appellant's first assignment of error is not well-taken.

Second Assignment of Error

{¶ 25} In his second assignment of error, appellant contends:

> THE TRIAL COURT ERRED IN FAILING TO FIND INEFFECTIVE ASSISTANCE OF COUNSEL BY APPLYING AN IMPROPER BURDEN OF PROOF AND WHERE DEFENSE COUNSEL FAILED TO ENFORCE THE TERMS OF THE PLEA AGREEMENT.

{¶ 26} Under this assignment of error, appellant sets forth an ineffective assistance of counsel claim, asserting that attorney Reinheimer, appellant's counsel during

sentencing, failed to object to statements made by the state that allegedly breached the plea agreement.

{¶ 27} To establish a claim for ineffective assistance of counsel, an appellant must show "(1) deficient performance of counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the proceeding's result would have been different." *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 204, citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Sanders*, 94 Ohio St.3d 150, 151, 761 N.E.2d 18 (2002), quoting *Strickland* at 694.

{¶ 28} There are countless ways to provide effective assistance in any given case; therefore, judicial scrutiny of counsel's performance must be highly deferential. *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989), citing *Strickland* at 689.

{¶ 29} The Supreme Court of Ohio has held that "the failure to make objections is not alone enough to sustain a claim of ineffective assistance of counsel." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 103. Moreover, even if a court determines that defense counsel should have objected to testimony or evidence at trial, an appellant must "show that a reasonable probability exists that the outcome of his trial would have been different had counsel done so." *Id.* at ¶ 108.

{¶ 30} In this case, the trial court denied appellant's amended motion for postconviction relief based on ineffective counsel, because appellant "failed to demonstrate that the outcome would have been different." Although the trial court's use of the word "demonstrate" in its holding does not technically fall in line with reasonable probability requirement of the *Strickland* test, we cannot say, based on the record before us, that the trial court abused its discretion in denying appellant's motion for postconviction relief.

{¶ 31} We previously stated that the trial court did not abuse its discretion when it found that the state did not breach the plea agreement. Therefore, the absence of an objection from appellant's counsel to statements made by the state during sentencing does not amount to representation falling below an objective standard of reasonableness, and thus would not have satisfied either prong of the *Strickland* test for ineffective assistance of counsel. The trial court assumed that even if appellant satisfied the first prong of the *Strickland* test, appellant did not prove the second prong, i.e. that the outcome would have been different. While prong two of the *Strickland* test does not require an appellant to per se prove or "demonstrate" that the outcome would have been different, the burden remains on appellant to show, with reasonable probability, that a different outcome would have occurred.

{¶ 32} Here, even assuming appellant could have reached prong two in the *Strickland* analysis, the trial court had sufficient evidence before it to find that appellant failed to show, with reasonable probability, that the outcome of his sentencing would

have been different. According to the transcript from the plea change hearing, the trial judge specifically asked appellant, "Has anyone promised that as a result of your plea today that you would receive a specific sentence like probation or judicial release?" After appellant responded "No," the court then proceeded to inform appellant of the maximum allowable sentences and fines appellant faced for each count he was pleading guilty to. The affidavit submitted by Attorney Bucher also stated that "[appellant] was in a good position to receive community control, but it was not certain." Perhaps most importantly, appellant even conceded at his postconviction hearing that the trial judge informed him of all potential sentences appellant faced, including a prison sentence. In fact, the 11-year sentence appellant received was well within the sentencing range at the trial judge's discretion. Therefore, the trial court did not abuse its discretion in rejecting appellant's claim for ineffective assistance of counsel. Nothing in the record indicates prejudice towards appellant, or that appellant did not otherwise understand the potential sentence he could receive at the trial court's discretion.

{¶ 33} Accordingly, appellant's second assignment of error is not well-taken.

{¶ 34} For the foregoing reasons, the judgment of the Ottawa County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE