ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellee, vs. Mark W. Wilfong, Defendant-Appellant.	: : : : : : : : :	Case No. 12-0190 On Appeal from the LAKE County Court of Appeals ELEVENTH Appellate District C.A. Case No. 2010-L-074

NOTICE OF APPEAL OF APPELLANT Mark W. Wilfong

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COUNSEL FOR APPELLEE, STATE OF OHIO

FILED
FEB 01 2012
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT Mark W. Wilfong

Appellant Mark W. Wilfong hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Lake County Court of Appeals, 11 Th. Appellate District, entered in Court of Appeals Case No. 2010-L-074 on 12-19-2011, ____.

This case raises a substantial constitutional question, involves a felony, and is of public or great general interest.

Mark Wilfong
SIGNATURE

Mark W. Wilfong #562-095
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was forwarded by regular U.S. Mail to Lake County, Prosecuting Attorney, Lake County, _____, _____, Ohio _____, this 25 day of Jan, 2012.

Mark Wilfong
SIGNATURE

Mark Wilfong 562-095
NAME AND NUMBER

DEFENDANT-APPELLANT, **PRO SE**

IN THE SUPREME COURT OF OHIO

STATE OF OHIO
Plaintiff-Appellee,

vs.

MARK W. WILFONG
Defendant-Appellant.

On Appeal from the Lake County Court of Appeals Eleventh Appellate District

Case No. 200-L-074

MEMORANDUM IN SUPORT OF JURISDICTION OF APPELLANT MARK W. WILFONG

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RECEIVED
FEB 01 2012
CLERK OF COURT
SUPREME COURT OF OHIO

I believe that this case is of great public interest and involves substantial constitutional questions.

I have attached my merit brief to support my assignments of error and constitutional right violations. I request this Honorable Court review the attached brief and opinions.

I come before this Court Pro-Se and have indigent status to afford an Attorney. I do not know the correct procedures to file with this Court nor the appropriate time to learn due to the 45 day limit to file an appeal.

I believe my rights where violated under due process. I'm doing an added sentence due to the enhancement under R.C. 2941.1413 whereas I was ineligible for due to the fact that prior DUI offenses where not only misdemeanors but uncounseled. The Trial Court as well as The Court of Appeals upheld my conviction because I failed to raise these issues in Trial Court. As my Brief indicates I thought the Trial Court, as well as my Attorney where aware of this so thought not to "rock the boat" as my Counsel indicated. For my failure to address the court as to the enhancement gives the Court the right to violate my constitutional rights to due process? I can assure this Honorable Court that I was totality ignorant as to the proceedings at the Trial Court Plea Colloquy. I was not afforded the statement by the Trial Judge that He "in-fact sentenced other defendants to the 10 year term for similar cases" until after I had pleaded guilty at the advise of my Counsel. My trial counsel wasn't even aware that my prior DUI offenses where not eligible for the enhancement for she failed to raise them, rendering her ineffective.

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

FILED
COURT OF APPEALS
[illegible] 03 2010
MAUREEN G. KELLY
CLERK OF COURT
LAKE COUNTY, OHIO

THE STATE OF OHIO

Plaintiff-Appellee

- vs. -

MARK WILFONG

Defendant-Appellant

APPEALS CT. CO. 2010-L-074

BRIEF OF DEFENDANT-APPELLANT MARK WILFONG

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STATEMENT OF THE CASE:

Procedural Posture:

On December 11, 2008, the Defendant-Appellant, Mark Wilfong, pled guilty to one count of Operating a Motor Vehicle Under the Influence of Alcohol or Drugs, a felony of the third degree pursuant to O.R.C. 4511.19 (A) The charge was accompanied by a specification that appellant, within 20 years of committing the current OVI offense, had been convicted of or pleaded guilty to five or more equivalent offenses. R.C. 2941.1413 with a specification as it was alleged to be a repeat offense. (Td.14)

On January 26, 2009, the trial sentenced Mr. Wilfong to seven (7) years in prison, two (2) years on the specification to be served prior to the five (5) years on the offense. (Td. 15)

On April 30, 3010, Mr. Wilfong filed a pro se motion to withdraw his guilty plea (Td. 23) On May 24, 2010, the State of Ohio's prosecuting attorney responded. (Td. 24) Without scheduled a hearing, the trial court denied Mr. Wilfong's motion to withdraw his guilty plea. (Td. 25)

Statement of the Facts:

This case stems from Mr. Wilfong's repeat offense of driving under the influence of alcohol or drugs.

ARGUMENT:

ASSIGNMENT OF ERROR:

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT-APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA AS HE WAS DENIED DUE PROCESS OF LAW.

Issue Presented for Review and Argument:

Whether the trial court erred when it overruled the defendant-appellant's Motion to withdraw his Guilty Plea without a hearing after the motion was filed.

Criminal Rule 32.1 sets forth when a guilty plea may be withdrawn and provides in pertinent part as follows:

> 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.

As a general rule, pre-sentence motions to withdraw a plea should be liberally granted. *State v. Peterseim* (1980), 68 Ohio App.2d 211. The standard of review for withdrawl of a guilty plea is an abuse of discretion. *State v. Ferranti* (1925), 112 Ohio St. 667, 676-678. An abuse of discretion may be found when the trial court applies the wrong legal standard, misapplies the correct legal standard or relies on clearly erroneous findings of fact. *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720 at 15. A post-sentence motion to withdraw a guilty plea will only be granted if the defendant can establish a manifest injustice. *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus; and Crim.R. 32.1. The burden of establishing the existence of such injustice is upon the defendant. *Id*.

A Court of Appeals reviews the trial court's denial of appellant's motion under an abuse of discretion standard, i.e., whether the trial court's attitude was unreasonable, arbitrary,or unconscionable. *State v. Xie* (1992), 62 Ohio.St.3d 521, 526, citing *State v. Adams* (1980), 62 Ohio St. 2d 151, 157. *State v. Floro,* 6th Dist. No. L-09-1065, 2010-Ohio-2254 at page 7. In evaluating motions to withdraw guilty pleas, the Eleventh District Court of Appeals has generally applied the four-part test pronounced by the Eighth District Court of Appeals in *Peterseim.* As stated by the *Peterseim* court, at paragraph three of the syllabus:

> A trial court does not abuse its discretion in overruling a motion to withdraw:
>
> (1) where the accused is represented by highly competent counsel,
>
> (2) where the accused was afforded a full hearing, pursuant to Crim.R. 11, before he entered the plea,
>
> (3) when, after the motion to withdraw is filed, the accused is given a complete and impartial hearing on the motion, and
>
> (4) where the record reveals that the court gave full and fair consideration to the plea withdrawal request.

Manifest injustice is determined by examining the totality of the circumstances surrounding the guilty plea. Paramount in this determination is the trial court's compliance with Crim.R. 11(C), evidence of which must show in the record that the accused understood his rights accordingly. *State v. Padgett* (Jul. 1, 1993), 8th Dist. No. 64846, 1993 Ohio App. LEXIS 3374, 2. A defendant seeking to withdraw a guilty plea following the imposition of sentence bears the burden of establishing manifest injustice. *State v. Jordan,* 10th Dist. No. 04AP-42, 2004-Ohio-6836, at page 5.

The decision whether to grant or deny a post-sentence motion to withdraw a guilty plea is within the sound discretion of the trial court. *Smith,* supra, at paragraph two of the syllabus; *State v. Pearson,* 11th Dist. Nos. 2002-G-2413 and 2002-G-2414, 2003-Ohio-6962 at 7. The good faith, credibility, and weight of the movant's assertions in support of the motion are to be resolved by the trial court. *Smith,* supra; *Jordan,* supra, at 5.

Appellate review of the trial court's denial of a post- sentence motion to withdraw a guilty plea is limited to a consideration of whether the lower court abused its discretion. The term "abuse of discretion" is one of art, connoting judgment exercised by a court, which does not comport with reason or the record. *State v. Underwood,* 11th Dist. No. 2008-L-113, 2009-Ohio-2089, at page 30, citing *State v. Ferranto* (1925), 112 Ohio.St. 667, 676-678.

Appellant's motion to withdraw his guilty plea was based on his assertion that his attorney did not fully explain the possible sentence and that prior Driving Under the Influence convictions could be used to enhance the sentence and did not prepare for trial but coerced him into a plea. He also alleged that the sentence was arbitrarily harsh compared to similarly situated defendants.

In the case at bar, appellant filed a Motion to Withdraw his Guilty plea after the sentence. The prosecutor's office responded. However, the trial court never scheduled a hearing on the Appellant's motion. Appellant was denied due process because he did not have the full opportunity to a hearing to explain his motion to withdraw his guilty plea. The court made its ruling simply on the pleadings.

Due process under the Fourteenth Amendment of the United States Constitution provides that "no State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the Laws." Likewise, the Ohio Constitution provides under Article I, Section 16 that "all courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." Mr. Wilfong was denied due process of law when the trial Court denied his motion to change his guilty plea without first giving him an opportunity to be heard on the following issues:

I. Ineffective Assistance of Counsel

The ABA Standards for Criminal Justice state that "to the extent, possible defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences and sentence that might ensue from the entry of the contemplated plea." See American Bar Association Standards for Criminal Justice: Pleas of Guilty (1999), Section 14-3.2(f).

Mr. Wilfong alleges that his attorney was ineffective in representing him. In order to establish a claim of ineffective assistance of counsel, it must be shown that an attorney's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington* (1984), 466 U.S. 668, 687. In order to establish deficient performance, it must be shown that, under the totality of the circumstances, counsel's representation fell below an objective standard of reasonableness. Id at 688. A court "must indulge a strong presumption that counsel's conduct falls within a wide range

of reasonable professional assistance." Id at 689. In order to establish prejudice, it must be shown that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been difference. Strickland at 694. A reasonable probability is "a probability sufficient to undermine the confidence in the outcome" of the proceeding. Id.

In the case at bar, Mr. Wilfong submits to this court that his trial attorney failed to advise him of all of the consequences of entering a guilty plea. He did not understand that the felony sentence could result in the amount of mandatory prison time that he was sentenced to serve. The trial court sentenced Mr. Wilfong to a mandatory prison term of seven (7) years.

Defendant relied of research that similarly situated defendants received lighter Sentences. See: *State of Ohio v. Brooke* (April 18, 2007) 2007-Ohio-1533, 113 Ohio St.3d 1999, 863 N.E.2d 1024 (trial court sentenced defendant on his sixth DUI offense to 60 days in jail and three (3) years of probation) and *State of Ohio v. Mikolajzcyk* (Eighth Appellate District, January 14, 2010) 2010-Ohio-75 (OHCA8) (trial court sentenced defendant on his sixth DUI with 120 days in jail.)

Mr. Wilfong also relied on his attorney's assurance that in light of his prior sentence of his 5th DUI in which he was sentenced to one (1) year incarceration, he would "more than likely suffer the same fate." The facts of the offense indicate that there were not any injuries as a result of his DUI. Mr. Wilfong did not tell the court about this during the sentencing hearing because he thought that the attorneys and court were aware.

After Mr. Wilfong filed his motion to withdraw his guilty plea, the trial Court should have scheduled a hearing so Mr. Wilfong could raise these issues.

II. Prior Convictions Uncounseled

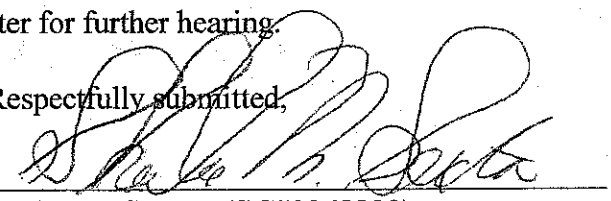
Mr. Wilfong pled to the Operating Vehicle Under the Influence of Alcohol or Drugs and the specification that this offense was his sixth OVI conviction. Tp 22 pg. lns 4-25 and Tp. 23, lns 1-8. However, the prior violations were uncounseled and Mr. Wilfong asserts that he did not have proper legal advice as to the prior offenses. He would have brought this information to the court's attention had the court scheduled a hearing on the Motion to Withdraw his guilty plea.

In *State v. O'Neill*, 2000-Ohio-2656, 140 Ohio App.3d 48, 746 N.E.2d 654 (Ohio App. 7 Dist. 2000), the Seventh District Court of Appeals held that an a defendant whose current conviction is being enhanced due to a a prior conviction may attack that prior conviction if the basis is a violation of the right to competent counsel. Mr. Wilfong believes that there were erroneous findings of fact as to his prior convictions that could be revealed by competent legal representation on his Motion to Withdraw Guilty plea. His prior attorney failed to research the prior convictions or to advocate zealously on his behalf. If the trial court had scheduled a hearing after Mr. Wilfong filed his Motion to withdraw his guilty plea, then he could have raised these issues.

Conclusion:

Mr. Wilfong's due process rights were violated when the Court failed to schedule a hearing on his motion to vacate his guilty plea. Mr. Wilfong raises significant issues with the ineffective assistance of trial counsel and factual errors that would likely impact the outcome of the case. A lengthy incarceration will result in this miscarriage of justice. For these reasons, it is respectfully requested that this Honorable Court reverse the trial court decision denying his Motion to Vacate the Guilty plea, reverse the trial court conviction and remand the matter for further hearing.

Respectfully submitted,



Sheila M. Sexton (SC#0068322)
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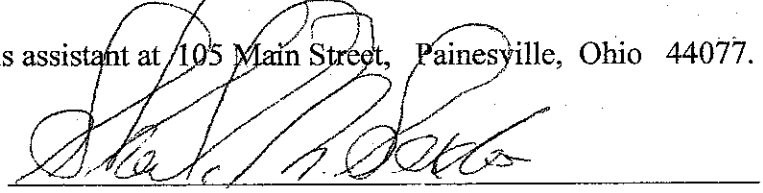
Attorney and Counselor at Law
for Mark Wilfong, Defendant-Appellant

Certificate of Service:

On this 6th day of December 2010, a true copy of the foregoing pleading was sent via regular U.S. mail postage prepaid to the following: Charles Coulson, Esq., Lake County Prosecutor or his assistant at 105 Main Street, Painesville, Ohio 44077.



Sheila M. Sexton (SC#0068322)
Attorney and Counselor at Law
for Mark Wilfong

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO, : OPINION

Plaintiff-Appellee, CASE NO. 2010-L-074

- vs -

MARK W. WILFONG,

Defendant-Appellant.

FILED
COURT OF APPEALS
DEC 19 2011
MAUREEN G. KELLY
CLERK OF COURT
LAKE COUNTY, OHIO

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 08 CR 000610.

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).

Sheila M. Sexton, McNamara & Loxterman, 8440 Station Street, Mentor, OH 44060 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This appeal is predicated upon a final judgment of the Lake County Court of Common Pleas. Appellant, Mark W. Wilfong, contests the validity of the trial court's decision overruling his post-sentencing motion to withdraw his guilty plea under Crim.R. 32.1. Specifically, appellant maintains that he should have been permitted to retract the guilty plea because he was denied effective assistance of trial counsel throughout the underlying criminal proceeding.

{¶2} In November 2008, the Lake County Grand Jury indicted appellant on two forms of operating a motor vehicle while under the influence of alcohol. Although each of the two counts contained slightly different allegations, both charged appellant with a third-degree felony under R.C. 4511.19(A). Furthermore, each count alleged that, prior to the institution of the instant action, he had been convicted of, or pleaded guilty to, two felony offenses under that same provision. Each count also had a specification under R.C. 2941.1413, asserting that appellant had been convicted of, or pleaded guilty to, at least five offenses under R.C. 4511.19(A) or (B) within the preceding 20 years.

{¶3} Approximately one month after entering an initial plea of not guilty to both counts, appellant negotiated a plea bargain with the state of Ohio. In return for the dismissal of the second count and accompanying specification, appellant agreed to plead guilty to the entire first count, including the main charge of operating a vehicle while under the influence and the R.C. 2941.1413 specification.

{¶4} Consistent with the terms of the plea bargain, appellant executed a written plea of guilty. In this document, appellant acknowledged that he was pleading guilty to a third-degree felony, and that the sentence for such an offense was a mandatory term of one to five years. Regarding the R.C. 2941.1413 specification, the document stated that appellant understood that he would be sentenced to a separate mandatory term of one to five years on this part of the count, and that this separate term would be served prior to and consecutive to the sentence on the main charge.

{¶5} On the same day appellant signed the written plea, the trial court held an oral hearing concerning the change of plea. In addition to describing the nature of the constitutional rights appellant was waiving, the court gave two explanations covering the

extent of the sentences which could be imposed for the "drunk driving" offense and the specification. These explanations were consistent with the "sentencing" statement set forth in the written plea. As part of the colloquy on this point, the trial court asked appellant if he understood that the shortest term he could receive for the offense and specification together was two years, and that the maximum possible term was 10 years. Appellant responded in the affirmative. Finally, the trial court expressly informed appellant that, in prior cases involving the same offense and specification, it had imposed a total term of 10 years.

{¶6} At the conclusion of the plea hearing, the trial court accepted appellant's guilty plea and referred the case to the adult probation department for a pre-sentencing investigation and report. Upon receiving that report, the trial court conducted a separate sentencing hearing, during which it heard the legal arguments of both trial counsel and allowed appellant to make an oral statement on the record. After considering the various submissions, the court issued its final sentencing judgment. Appellant was ordered to serve consecutive terms of five years on the main charge and two years on the specification, for an aggregate sentence of seven years. The final judgment also imposed a mandatory fine of $1,350 and suspended appellant's license to drive for the remainder of his life.

{¶7} Immediately following the imposition of his sentence, appellant did not try to pursue a timely appeal of his conviction. However, after serving 15 months of his seven-year sentence, he filed a motion to withdraw his guilty plea under Crim.R. 32.1. As the primary basis for the motion, appellant asserted that his plea had not been entered knowingly and voluntarily because his trial attorney failed to provide adequate

advice regarding certain issues in the case. Specifically, he maintained that he should be allowed to retract his plea because: (1) his counsel had informed him that he would likely receive only a one-year sentence for the offense and specification; and (2) his counsel had not addressed the issue of whether his prior convictions for "drunk driving" could be used for purposes of enhancing his sentence. As a distinct argument, appellant also contended that he was entitled to relief because the trial court abused its discretion in sentencing him to an aggregate term of seven years.

{¶8} After the state submitted a written response to the motion to withdraw, the trial court rendered its judgment on the matter without the benefit of an oral hearing. In overruling the motion, the trial court expressly found that acceptance of the guilty plea did not result in a manifest injustice warranting its withdrawal. As to appellant's "sentencing" argument, the court concluded that a review of the written guilty plea and the "plea" hearing demonstrated that he was fully informed of the extent of the possible sentence, and that he indicated in response to specific questions that he was aware of the possible maximum sentence for both the main charge and the specification. Concerning the "prior convictions" dispute, the trial court held that, since appellant did not raise this issue during the plea hearing, he was barred from asserting the point after sentencing under the doctrine of res judicata.

{¶9} In challenging the merits of the foregoing determination before this court, appellant has advanced the following assignment of error:

{¶10} "The trial court erred in overruling the defendant-appellant's motion to withdraw his guilty plea as he was denied process of law."

{¶11} Under this sole assignment, appellant essentially states that the trial court

failed to employ the required procedure in disposing of his motion to withdraw his guilty plea. According to him, the arguments asserted in his motion were sufficient to warrant an oral hearing prior to the issuance of any final determination, and that if the trial court had conducted such a proceeding, he would have been able to present new materials in support of his points. Based upon this, appellant submits that the denial of his motion must be reversed because his fundamental right to due process was violated.

{¶12} As previously indicated, appellant's motion before the trial court was made pursuant to Crim.R. 32.1. That rule provides that, although a motion to withdraw a guilty plea may typically be filed only before the imposition of sentence, such relief can still be granted via a post-judgment motion when it is necessary to avoid a "manifest injustice." In interpreting the key phrase of the rule, this court has defined a "manifest injustice" as a clear or openly unjust act. *State v. O'Connell*, 11th Dist. No. 2010-L-030, 2011-Ohio-652, at ¶31. "The logic behind this high standard is 'to discourage a defendant from pleading guilty to test the weight of potential reprisal, and later withdraw the plea if the sentence was unexpectedly severe.' *State v. Caraballo* (1985), 17 Ohio St.3d 66, 67, ***." *State v. Delmanzo*, 11th Dist. No. 2009-L-167, 2010-Ohio-3555, at ¶21. Given the nature of the "manifest injustice" standard, this court has consistently emphasized that a post-sentence motion to withdraw a guilty plea can only be granted when extraordinary circumstances actually exist. *State v. Madeline* (Mar. 22, 2002), 11th Dist. No. 2000-T-0156, 2002 Ohio App. LEXIS 1348, at *7-8.

{¶13} As a general proposition, the burden of showing a manifest injustice rests upon the defendant. *O'Connell*, 2011-Ohio-652, at ¶31. To carry this burden, the defendant cannot rely solely upon bald assertions stated in the motion; rather, his

arguments must be supported by specific facts set forth in the trial record or in affidavits accompanying the motion. *Delmanzo*, 2010-Ohio-3555, at ¶22. Any ruling as to the existence of a manifest injustice must be predicated upon a consideration of all facts surrounding the entry of the plea, with special emphasis placed upon the Crim.R. 11(C) colloquy between the trial court and the defendant. Id. at ¶22, citing *State v. Padgett* (July 1, 1993), 8th Dist. No. 64846, 1993 Ohio App. LEXIS 3374, at *2.

{¶14} In applying Crim.R. 32.1 on numerous occasions, this court has indicated that the decision to grant or deny a motion to withdraw lies within the sound discretion of the trial court; as a result, the scope of our review on appeal is limited to determining if an abuse of discretion took place. *State v. Borecky*, 11th Dist. No. 2007-L-197, 2008-Ohio-3890, at ¶14. As to the substance of this standard of review, we have stated that an abuse of discretion should only be found when the trial court's underlying attitude is either unreasonable, arbitrary or unconscionable. Id. Along the same lines, this court has noted that an abuse of discretion connotes a failure to employ sound, reasonable and legal decision-making. *O'Connell*, 2011-Ohio-652, at ¶26, citing *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62.

{¶15} A review of the prior precedent in our jurisdiction shows that a defendant's request to withdraw his guilty plea is often based upon a basic assertion of ineffective assistance of trial counsel. In describing the standard that must be used in considering the merits of such an assertion, this court has emphasized:

{¶16} "A properly licensed attorney is presumed to have rendered effective assistance to a defendant. *** 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. *** The burden of proving ineffective assistance of counsel falls upon the defendant. ***." (Citations omitted.) *Delmanzo*, 2010-Ohio-3555, at ¶33.

{¶17} In regard to the necessary causal connection between the guilty plea and the ineffective assistance, our prior precedent indicates that the defendant cannot merely maintain that, if it were not for trial counsel's error, he never would have agreed to enter the guilty plea. *Madeline*, 2002 Ohio App. LEXIS 1348, at *10, citing *State v. Sopjack* (Dec. 15, 1995), 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.

{¶18} As was noted above, a defendant cannot carry his burden in attacking the validity of his guilty plea simply by making an unsupported assertion. In explaining this principle in the context of an "ineffective assistance" argument, we have stated:

{¶19} "A claim that a guilty plea was induced by ineffective assistance of counsel must be supported by evidence where the record of the guilty plea shows it was voluntarily made. *State v. Malesky* (Aug. 27, 1992), 8th Dist. No. 61290, 1992 Ohio App. LEXIS 4378; see, also, *State v. Kapper* (1983), 5 Ohio St.3d 36, ***. In *Malesky*, the court held:

{¶20} "'A naked allegation by a defendant of a guilty plea inducement, is insufficient to support a claim of ineffective assistance of counsel, and would not be upheld on appeal unless it is supported by affidavits or other supporting materials,

substantial enough to rebut the record which shows that his plea was voluntary.' 1992 Ohio App. LEXIS 4378, at *5.

{¶21} "In *Kapper*, the Supreme Court adopted the following rationale:

{¶22} ""(***) (A)n allegation of a coerced guilty plea involves actions over which the State has no control. Therefore the defendant must bear the initial burden of submitting affidavits or other supporting materials to indicate that he is entitled to relief. Defendant'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. (***).'" Id. at 38." *State v. Gotel*, 11th Dist. No. 2006-L-015, 2007-Ohio-888, at ¶11-14.

{¶23} In the instant matter, the primary contention in appellant's post-judgment motion to withdraw was that his decision to plead guilty had turned upon the bad advice of his trial counsel regarding the extent of his sentence; i.e., according to him, counsel told him that he would only be given a one-year term for the "drunk-driving" offense and specification. However, in raising this point in the text of his motion, appellant failed to attach any affidavits or other evidentiary materials to actually prove the factual assertion upon which the contention was based.

{¶24} In conjunction with the foregoing, it must also be noted that the trial record before this court readily shows that appellant was fully informed of the extent of the jail term which could be imposed. That is, as part of the written guilty plea and the Crim.R. 11(C) colloquy with the trial court during the oral hearing, it was clearly explained to him that the range of his aggregate sentence was between two and 10 years. Thus, by not submitting any evidentiary materials supporting the alleged "one-year" statement by his trial counsel, appellant failed to rebut the fact established by the trial record that his

guilty plea had been made knowingly and voluntarily. To this extent, appellant's motion was legally insufficient to prove that the performance of his counsel had been deficient as it related to his understanding of the possible ramifications of pleading guilty.

{¶25} In relation to the issue of sentencing, appellant also argued in his motion to withdraw that he must be allowed to retract his guilty plea because the trial court had abused its discretion in imposing an aggregate term of seven years. In support of this point, appellant cited a series of prior cases which, according to him, demonstrated that other criminal defendants who had been charged with a third-degree felony under R.C. 4511.19(A) have typically received a substantially shorter sentence than what the trial court ordered in this instance.

{¶26} As to this point, this court would emphasize that appellant's sentence was obviously not imposed until after he had entered his guilty plea; as a result, any error as to his sentencing would have had no effect upon the validity of the plea. In light of this, it logically follows that if appellant wanted to challenge the propriety of the seven-year term, he could only do so in a timely direct appeal from his conviction. The trial record in the underlying case shows that appellant chose not to pursue that separate remedy when the trial court's sentencing judgment was rendered in January 2009. Therefore, appellant was barred under the doctrine of res judicata from raising the question in his subsequent motion to withdraw his guilty plea. See, e.g., *State v. Whatley*, 9th Dist. No. 24231, 2008-Ohio-6128, at ¶9.

{¶27} Under the third argument in his Crim.R. 32.1 motion, appellant stated that he was denied effective assistance at the trial level because his counsel never prepared to take his case to trial or otherwise protect his constitutional rights. He further stated

that, given the lack of preparation, counsel coerced him into accepting the plea bargain and entering the guilty plea.

{¶28} Regarding this argument, our review of the trial record again indicates that appellant did not attach to his motion any affidavits or other evidentiary materials directly supporting his "coercion" assertion. Hence, since the sole materials before the trial court could only be construed to establish that the guilty plea had been entered voluntarily, appellant again failed to prove that the actions of his trial counsel were deficient in any respect.

{¶29} Under the final aspect of his motion to withdraw, appellant argues that his conviction should not be allowed to stand because his trial counsel never reviewed the issue of whether he had received proper legal representation in his prior five convictions under R.C. 4511.19(A). In raising this separate point, though, appellant again failed to present sufficient materials to allow the trial court to address the merits of his argument. First, he never indicated which, if any, of his prior convictions had been "uncounseled" and, as a result, could not be used as a penalty enhancement. Second, and more importantly, he failed to submit any evidentiary materials indicating that he was not represented in any of the prior "drunk-driving" proceedings.

{¶30} In attempting to overcome the fact that he did not attach any evidentiary materials to his motion to withdraw, appellant maintains that he could have elaborated upon each of his four arguments if the trial court would have scheduled a hearing on the matter. In considering the need for an oral hearing in regard to a post-sentence motion under Crim.R. 32.1, this court has concluded that such a hearing is mandatory when the defendant's allegations, if accepted as true, would be sufficient to justify the withdrawal

of the guilty plea. *Borecky*, 2008-Ohio-3890, at ¶30. On the other hand, an oral hearing is not necessary when the defendant's allegations are conclusively refuted by the trial record. Id.

{¶31} In our case, appellant's assertion as to the extent of his prison term was clearly contradicted by the information set forth in the written guilty plea and in the Crim.R. 11(C) colloquy. The same is also true of appellant's allegation that his guilty plea was coerced by his trial counsel. Moreover, regarding appellant's "uncounseled prior convictions" argument, the nature of his allegations was not such that they could be refuted by the trial record; nevertheless, they were still not sufficiently specific to indicate which convictions could be disputable for lack of representation. Therefore, as to the three arguments which could conceivably be viable grounds for a motion to withdraw, appellant did not satisfy his initial burden requiring an oral evidentiary hearing.

{¶32} For the foregoing reasons, appellant was unable to demonstrate in any of his four arguments that a manifest injustice would continue to exist if he was not allowed to withdraw his guilty plea. Thus, since the trial court did not abuse its sound discretion in overruling appellant's post-sentence motion under Crim.R. 32.1, his sole assignment of error is without merit.

{¶33} Consistent with the foregoing analysis, it is the order of this court that the judgment of the trial court is affirmed.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.

STATE OF OHIO	)	**IN THE COURT OF APPEALS**
	)SS.	
COUNTY OF LAKE	)	**ELEVENTH DISTRICT**

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

MARK W. WILFONG,

Defendant-Appellant.

JUDGMENT ENTRY

CASE NO. 2010-L-074

On June 2, 2011, appellant filed a petition for preliminary injunction construed by this court as a motion. Essentially, appellant advances arguments that he could not be sentenced under the specification contained in R.C. 2941.1413 because he has not committed the requisite number of offenses to satisfy that specification. This argument was addressed in the court's opinion and was rejected. Accordingly, for those reasons, appellant's motion in this regard is overruled.

Appellant also moved this court for an order of release and discharge. However, finding no merit in appellant's assignment of error, this court issued an opinion affirming the trial court's decision. Accordingly, appellant's motion for release and discharge is also overruled.

FILED
COURT OF APPEALS
DEC 19 2011
MAUREEN G. KELLY
CLERK OF COURT
LAKE COUNTY, OHIO

Thomas R Wright

JUDGE THOMAS R. WRIGHT

STATE OF OHIO	)	**IN THE COURT OF APPEALS**
	)SS.	
COUNTY OF LAKE	)	**ELEVENTH DISTRICT**

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

MARK W. WILFONG,

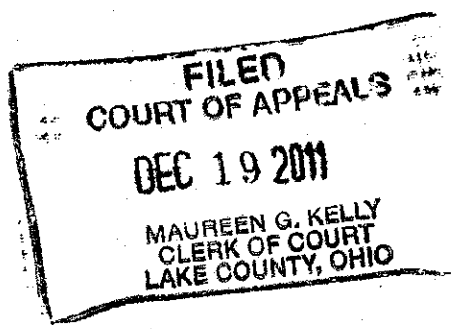
Defendant-Appellant.

JUDGMENT ENTRY

CASE NO. 2010-L-074

For the reasons stated in the opinion of this court, appellant's assignment of error is without merit. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

Costs to be taxed against appellant,



Thomas R Wright

JUDGE THOMAS R. WRIGHT

FOR THE COURT