[Cite as *State v, Ryan*, 2024-Ohio-2557.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

THERESA A. RYAN,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 23 BE 0041

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 21 CR 20

BEFORE:
Carol Ann Robb, Mark A. Hanni, Katelyn Dickey, Judges.

JUDGMENT:
Affirmed.

Atty. J. Kevin Flanagan, Belmont County Prosecutor*, Atty. Jacob A. Manning,* Assistant Prosecuting Attorney, for Plaintiff-Appellee and

Theresa A. Ryan, Pro se.

Dated: June 28, 2024

Robb, P.J.

{¶1} Defendant-Appellant Theresa A. Ryan appeals the judgment of the Belmont County Common Pleas Court denying a motion to vacate filed more than two years after she was sentenced on a guilty plea. Appellant argues her constitutional double jeopardy rights were violated based on her claim that she was already punished for the same type of conduct in another county. She likewise says defense counsel rendered ineffective assistance by failing to recognize this when advising her about the plea agreement. For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} On February 24, 2021, Appellant was indicted in Belmont County on two counts of illegal conveyance of drugs of abuse onto the ground of a specified government facility, third-degree felonies. *See* R.C. 2921.36(A)(2),(G)(2). The offenses were alleged to have occurred in Belmont County between May 1, 2020 and July 6, 2020. The bill of particulars specified the mailing address for the Belmont Correctional Institution (BeCI) as the government facility at issue.

{¶3} On May 19, 2021, Appellant entered into a negotiated plea agreement. She pled guilty to count one as charged and count two as amended to complicity to drug possession (a fifth-degree felony). *See* R.C. 2925.11(A); R.C. 2923.03(A)(2). The written plea shows the state agreed to recommend an aggregate prison sentence of 42 months to run consecutively to a prison sentence she was already serving in another case. The state also agreed to refrain from opposing a motion for judicial release filed at the appropriate time if Appellant had a good-conduct report from the warden.

{¶4} A presentence investigation report (PSI) was ordered. Attached to the PSI were incident reports from the investigating trooper setting forth the following facts resulting in the instant offenses (facts she believes are supportive of her double jeopardy appellate argument). On May 26, 2020, BeCI intercepted mail addressed to an inmate (inmate N) because the label on the envelope claimed to be legal mail from the Ohio Innocence Project but lacked an authenticator feature. The envelope contained multiple printed pages, some appearing suspicious in nature. Subsequent testing by the Bureau of Criminal Investigation (BCI) revealed the pages contained a synthetic cannabinoid

constituting a schedule I controlled substance. Appellant's fingerprints were found on certain pages. The trooper's May 27, 2020 incident report noted Appellant had previously pled guilty to illegal conveyance of drugs of abuse into the Mansfield Correctional Institution (ManCI) and was scheduled for sentencing in that Richland County case on June 1, 2020.

{¶5} The trooper listened to prison calls made since May 1, 2020 between inmate N and Appellant's phone number. Initially, Appellant and this inmate discussed the strength, the number of pages, and the payment for the next batch of Appellant's product. In subsequent calls, they discussed additional payments, Appellant's shipment to another inmate, her use of legal mail labels, and the page numbers containing the sprayed-on product.

{¶6} Three days after the prison's May 26 mail interception, inmate N told Appellant he did not receive her shipment. Later, the inmate told Appellant he received notice of legal mail waiting for his review. The prison had replicated the communication and sent it to the inmate. On June 2 (the day after Appellant's sentencing in Richland County), inmate N called Appellant's phone number and complained to Appellant's relative, who answered the phone, that the pages he received were not legitimate. He requested a refund. During a resulting three-way call with Appellant, she identified specific page numbers for the inmate to try but said they should be obvious.

{¶7} While she was incarcerated in the Ohio Reformatory for Women, Appellant was heard in recorded prison calls instructing an associate to carry on with her business for her. Appellant mentioned colored powders, measurements, and avoiding spots while spraying the paper to be mailed. She spoke about providing this associate with a printer/copier and pre-printed documents from the Ohio Innocence Project with corresponding address labels. Telling her associate it was a $30,000 enterprise, Appellant discussed shipments for two named inmates at BeCI (inmate N and inmate T). After the associate communicated with inmate N about shipments, Appellant instructed her associate to send more than the inmate requested. The associate then reported back to Appellant how many pages he sent.

{¶8} A week later, on July 6, 2020, BeCI intercepted a letter to inmate N and a letter to inmate T, both with labels purporting to be from the Ohio Innocence Project.

Testing by the Ohio State Highway Patrol Crime Lab showed the same synthetic cannabinoid that was found in the letter intercepted by BeCI on May 26, 2020.

{¶9} The PSI and the attached reports were provided to the parties and the court before sentencing. At sentencing, the court imposed 36 months on count one and 6 months on count two to run consecutively for a total of 42 months commencing at the conclusion of the prison sentence she was then serving (as recommended by the state). No appeal was filed from the June 3, 2021 sentencing order.

{¶10} On August 22, 2023, Appellant filed a pro se motion seeking to vacate her conviction or sentence. She asked for a "new trial" while citing Criminal Rule 33.1, a non-existent rule. We note a motion to withdraw a guilty plea is contained in Crim.R. 32.1 and a motion for a new trial is contained in Crim.R. 33 (but there was no trial as Appellant pled guilty). Although filed in a criminal case where a rule exists to address the relief requested, her motion also cited Civil Rule 60(B) and mentioned inadvertence, excusable neglect, and fraud.

{¶11} Appellant's motion was based on the assertion that her Belmont County convictions were barred by double jeopardy because she was already convicted in Richland County for the same offense, citing Richland County C.P. No. 2019 CR 0687. After acknowledging her involvement in a conspiracy to smuggle suboxone into a prison located in Richland County, she argued her conveyance of drugs into the Belmont County prison should be considered the same drug smuggling conspiracy.

{¶12} Citing the June 1, 2020 sentencing transcript in her Richland County case, Appellant claimed the double jeopardy argument was strengthened by that court's observation that she continued to commit offenses in Belmont County while on pretrial supervision in Richland County (when deciding not to accept the Richland County prosecutor's sentencing recommendation). Appellant noted the court in Richland County also cited this pretrial supervision conduct when subsequently denying her motion for judicial release in December 2020.

{¶13} Appellant's motion concluded defense counsel was ineffective by advising her to plead guilty in Belmont County instead of raising double jeopardy in a motion to

dismiss. She acknowledged defense counsel advised her the Belmont County prosecution was not barred by the Richland County conviction.[1]

{¶14} On September 21, 2023, the trial court overruled Appellant's motion. The court noted the motion's citation to inapplicable rules and explained the double jeopardy clause would not bar the Belmont County conviction because she committed the offenses in different counties on different dates and thus committed the offenses separately. *Citing State v. Miller*, 2020-Ohio-3854, 156 N.E.3d 297, ¶ 61 (11th Dist.) (where the defendant pled guilty in Summit County and then asked for dismissal in Portage County where he was charged for possessing the same gun, the court held double jeopardy does not apply where he possessed the gun in different counties on different dates). Appellant filed a timely notice of appeal from the trial court's judgment.

ASSIGNMENTS OF ERROR

{¶15} Appellant's brief sets forth the following three assignments of error:

"APPELLANT'S CONVICTION AND SENTENCE WAS ILLEGAL AS A MATTER OF LAW."

"THE LOWER COURT ERRED IN DENYING APPELLANT'S 33.1 MOTION TO VACATE CONVICTION FOR VIOLATING THE DOUBLE JEOPARDY CLAUSE OF THE US CONSTITUTION."

"APPELLANT'S TRIAL COUNSEL FAILED TO OBJECT TO IRRELEVANT AND PREJUDICIAL EVIDENCE, RESULTING IN INEFFECTIVE ASSISTANCE OF COUNSEL."

{¶16} Appellant's assignments of error all rely on her double jeopardy argument. Her brief recognizes "this case comes down to" whether the June 1, 2020 Richland County conviction and sentence barred the State of Ohio from prosecuting her in Belmont County for additional criminal acts committed on other dates. (Apt.Br. at 1). She asks this court to overlook mistakes in labeling her pro se motion below, citing another inapplicable procedural rule (from a different jurisdiction). Based upon the request for a

[1] In her August 22, 2023 motion, Appellant also said defense counsel failed to file a motion for judicial release in the Belmont County case as she requested; she attached a letter to her former attorney telling him if he did not comply with her requests, she would file a complaint with the Ohio Bar Association. Counsel filed the requested judicial release motion on August 15, 2023, three days after the date she placed on her letter to him (indicating he likely received the letter after he had already filed the judicial release motion for her). The court denied the motion for judicial release on August 18, 2023.

new trial (when there was no trial), the citation to a non-existent rule (Crim.R. 33.1), the arguments made in seeking to vacate her conviction, and the timing of the motion,[2] her filing appears to be a Crim.R. 32.1 motion to withdraw a guilty plea based on ineffective assistance of counsel for failing to raise a double jeopardy argument prior to advising her to enter a plea.

{¶17} "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." Crim.R. 32.1. Accordingly, a post-sentence plea withdrawal motion is warranted "only in extraordinary cases" where a defendant meets her burden of showing post-sentence plea withdrawal is "necessary" to correct a manifest injustice. *State v. Stumpf*, 32 Ohio St.3d 95, 104, 512 N.E.2d 598 (1987); *State v. Smith*, 49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1977) (undue delay adversely affects the weight of the assertions). The denial of a post-sentence plea withdrawal motion cannot be reversed unless the trial court abused its discretion in declining to find a manifest injustice. *State v. Straley*, 159 Ohio St.3d 82, 2019-Ohio-5206, 147 N.E.3d 623, ¶ 15.[3]

{¶18} Appellant suggests her plea was not voluntary due to counsel's failure to correctly advise her on her double jeopardy rights or file a motion to dismiss on double jeopardy grounds. When "seeking to invalidate a guilty plea based on ineffective

[2] The motion would be untimely under the post-conviction relief statute with no showing of the requirements for an untimeliness exception. R.C. 2953.21(A)(2) ("the petition shall be filed no later than three hundred sixty-five days after the expiration of the time for filing the appeal"); R.C. 2953.23(A)(1).

[3] Although the state does not raise res judicata and the trial court did not mention it, we further note when a plea withdrawal motion is based on evidence in the record or on an argument that could have been raised in a direct appeal from the sentencing entry, the ability to raise the issue in a post-sentence plea withdrawal motion may be barred by the doctrine of res judicata. *State v. Straley*, 159 Ohio St.3d 82, 2019-Ohio-5206, 147 N.E.3d 623, ¶ 15, citing *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶ 59. The existence of a plea agreement in her Richland County drug case was in the PSI filed in this case. Moreover, it's possible Appellant made arguments on the upcoming Richland County sentencing on the record in the case at bar (in the absence of a written motion to dismiss on the topic she admits she discussed with counsel). Appellant failed to meet her burden of ensuring the plea and sentencing transcripts were transcribed and filed here in order to show the issue as related to the facts in the PSI was not discussed on the record in this case. Instead, she cites evidence outside of the record (the *subsequent* sentencing entry and transcript from her Richland County case along with allegations about her attorney's legal advice), which could avoid some aspects of res judicata; nevertheless, the record in the case at bar is incomplete due to her failure to order the transcripts. *See e.g., State v. Griffin*, 7th Dist. Mahoning No. 22 MA 0126, 2023-Ohio-4011, ¶ 23; *State v. Miller*, 7th Dist. Mahoning No. 22 MA 0090, 2023-Ohio-2290, ¶ 11. In any event, we need not rely on res judicata here due to the rejection of her legal argument on double jeopardy.

assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that he was prejudiced by the deficiency, i.e., a reasonable probability that he would not have agreed to plead guilty but for counsel's deficiency." *State v. Helms*, 7th Dist. Mahoning No. 14 MA 96, 2015-Ohio-1708, ¶ 11, citing, *e.g., State v. Xie*, 62 Ohio St.3d 521, 524, 584 N.E.2d 715 (1992). If the performance was not deficient, then there is no need to review for prejudice and vice versa. *See State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000).

{¶19} In general, we defer to counsel's decisions and recognize the performance was not deficient unless there existed "a substantial violation of any of defense counsel's essential duties to his client." *State v. Bradley*, 42 Ohio St.3d 136, 142-143, 538 N.E.2d 373 (1989), citing *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Prejudice from defective representation justifies reversal only where the results were unreliable or the proceeding was fundamentally unfair in that there is a reasonable probability the results would have been different but for counsel's serious error. *Id.* at 557-558, citing *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

{¶20} If Appellant's double jeopardy argument is meritless, then there can be no deficiency or prejudice to her case by counsel's failure to object or file a motion on double jeopardy grounds. *See, e.g., State v. Saffell*, 7th Dist. Jefferson No. 19 JE 0021, 2020-Ohio-7022, ¶ 51 ("When a claim for ineffective assistance of counsel is made based on failure to file an objection or a motion, the appellant must demonstrate that the objection or motion had a reasonable probability of success. If the objection or motion would not have been successful, then the appellant cannot prevail on the ineffective assistance of counsel claim."). Likewise, if her argument lacks legal merit on the acknowledged facts, then her motion was properly denied regardless of how a court recasts the motion.

{¶21} The double jeopardy clause in the Fifth Amendment to the United States Constitution states: "No person shall * * * be subject for the same offense to be twice put in jeopardy of life or limb." Similarly, Ohio's Constitution at Section 10 of Article I states: "No person shall be twice put in jeopardy for the same offense." The two double jeopardy clauses carry the same protections. *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, ¶ 14.

{¶22} The double jeopardy clause protects a criminal defendant from repeated prosecutions for the same offense. *State v. Loza*, 71 Ohio St.3d 61, 71, 641 N.E.2d 1082 (1994), citing *Oregon v. Kennedy*, 456 U.S. 667, 671, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). *See also State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 10 (the clause protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense).

{¶23} As the trial court explained, two different counties may pursue the prosecution of separate acts committed on different dates. *Miller*, 2020-Ohio-3854 at ¶ 59-61 (no double jeopardy violation to prosecute multiple instances or "transactions" constituting the offense of having a weapon while under disability even if each involved the same firearm where they occurred on different dates at different locations). It is not merely the type of offense that governs the analysis.

{¶24} For instance, where a defendant possessed the same handgun on four separate occasions at different times and locations, the offense of having a weapon while under disability was committed with separate conduct and/or animus allowing a sentence on each of the four offenses. *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 216-217, applying R.C. 2941.25 (merger statute codifying double jeopardy principles) and *Ruff*, 143 Ohio St.3d 114 at ¶ 25 (multiple sentences can be imposed where the offenses are dissimilar in import or significance in that they caused separate identifiable harms, were committed separately, or were committed with separate animus). *See also State v. Cervantes*, 6th Dist. Wood No. WD-22-004, 2022-Ohio-4018, ¶ 19-20 (where a distinct assault on the victim occurred in each county, the defendant's double jeopardy claim was based on his mistaken belief he was being prosecuted for offenses of which he was already convicted).

{¶25} In the case at bar, Appellant was charged with two counts of illegal conveyance of drugs of abuse onto the grounds of a specified government facility in Belmont County between May 1, 2020 and July 6, 2020. As part of the negotiated plea, the state agreed to lower one of these third-degree felonies to a fifth-degree felony by

amending count two to drug possession (through complicity)[4]. The basis for these Belmont County charges was Appellant's involvement in sending drugs to inmates in a prison located in Belmont County. A letter containing drugs, which she fraudulently marked as legal mail from the Ohio Innocence Project, arrived at BeCI for inmate N on May 26, 2020. During inmate N's recorded prison calls, Appellant incriminated herself as the preparer and sender of this item (before her sentencing on pending Richland County charges). Subsequently, two letters containing drugs arrived at BeCI for inmate N and inmate T on July 6, 2020. While imprisoned after her Richland County sentencing, Appellant was recorded instructing her associate to spray, label, and send these items to the inmates.

{¶26} In the out-of-county case Appellant relies on for her double jeopardy claim, she was convicted of illegal conveyance of drugs of abuse onto the grounds of a specified government facility, drug trafficking, and drug possession based on her admitted drug smuggling into a prison in Richland County. The Richland County criminal case number itself demonstrates the indictment occurred in 2019, *before* her incriminating phone calls and transactions in Belmont County. The incident report attached to the PSI filed in the Belmont County case also shows Appellant pled guilty in Richland County *before engaging* in the conduct for which she was indicted in Belmont County. She committed the Belmont County offenses while on pretrial release in Richland County.[5]

{¶27} Contrary to Appellant's claim, the sentencing court in Richland County was not imposing punishment for the Belmont County offenses merely because the Richland County sentencing court criticized her for committing the same type of offenses while she was on pretrial release. Clearly, the Belmont County offenses did not arise from the same instances of conduct. The offenses occurred in different years at different prisons located in different counties with different drugs. (According to her claims, different drug types were involved in each county as well; the Belmont County case involved her smuggling

[4] We note a person who is guilty of complicity in the commission of an offense shall be prosecuted and punished as a principal offender; while the charge can be specified in the indictment as complicity, it need not be, as the charge can simply allege the principal offense. R.C. 2923.03(A).

[5] Notably, the Belmont County indictment's recitation of the location of the offense as "Richland Township, Belmont County, Ohio" has no relation to Richland County. Also, the bill of particulars specified the St. Clairsville, Ohio mailing address where BeCI is located.

synthetic cannabinoids into a prison while Appellant claims the Richland County case involved her smuggling suboxone into another prison.)

{¶28} Sentencing courts regularly reject plea recommendations and chastise defendants for committing new crimes while on pretrial supervision. The defendant's conduct while on bail pending trial is a permissible sentencing factor. The consideration of such a sentencing factor does not equate to punishment for offenses pending (or being investigated) in another county. *See State v. Burton*, 52 Ohio St.2d 21, 23, 368 N.E.2d 297 (1977) ("it is well-established that a sentencing court may weigh such factors as arrests for other crimes * * * Few things can be so relevant as other criminal activity of the defendant"). Likewise, the mention of continuing criminal behavior after a plea or sentence in Richland County's judgment denying judicial release is not the imposition of punishment for the Belmont County crimes. It is "implausible" to claim the double jeopardy clause is implicated when a sentencing court references other crimes. *Id.* Moreover, the Richland County sentencing court cited multiple reasons why it was choosing to impose a prison sentence; Appellant's 2020 conduct in Belmont County was merely one stick in the bundle of negative sentencing factors applicable to Appellant.

{¶29} Finally, we point out Appellant was sentenced in Richland County *before* her incriminating phone calls to her associate where she gave instructions to carry on with her operation and before BeCI's July 6, 2020 interception of two letters to two different inmates containing drugs of abuse. Contrary to Appellant's contention and citation to case law involving the co-existence of federal and state charges, the trial court did not apply a separate sovereign doctrine. The conduct resulting in Appellant's two Ohio criminal cases occurred on different dates (and in different locations); the Belmont offenses were committed separately from the Richland County offenses and with separate animus. Appellant's declaration that she was engaged in some broad smuggling conspiracy does not mean her prosecution for conveyances or transactions in Richland County protects her from being prosecuted for *subsequent* drug offenses. This would essentially be arguing double jeopardy provided her a free pass to keep sending drugs into prisons after the initiation of the Richland County prosecution.

{¶30} In conclusion, Appellant's double jeopardy argument is meritless. Defense counsel therefore did not render ineffective assistance by negotiating a plea agreement

without first raising a double jeopardy argument to the trial court. There was no manifest injustice supporting a claim for post-sentence plea withdrawal more than two years after sentencing and no reason to vacate her conviction and sentence as she requested. Accordingly, Appellant's assignments of error are overruled.

{¶31} For the foregoing reasons, the trial court's judgment denying Appellant's post-sentence motion is affirmed.

Hanni, J., concurs.

Dickey, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.