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

STATE OF OHIO, Plaintiff-Appellee vs. ANTHONY CIOFFI, JR., Defendant-Appellant	)))))))))	CASE NO. 2002-TR-00037 2002-TR-00039

BRIEF OF PLAINTIFF-APPELLEE

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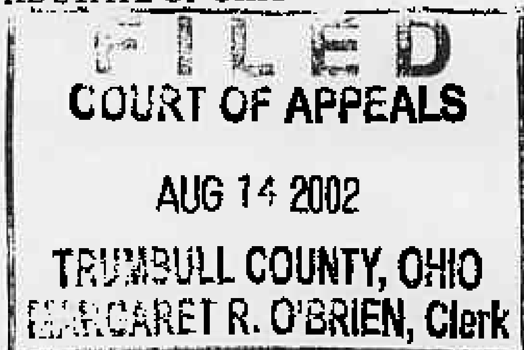

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	)	2002-TR-00039
Plaintiff-Appellee	)	
	)	
vs.	)	
	)	
ANTHONY CIOFFI, JR.,	)	
	)	
Defendant-Appellant	)	

BRIEF OF PLAINTIFF-APPELLEE

STATEMENT OF THE CASE

Procedural Posture

The Trumbull County Grand Jury on November 17, 1995, indicted Defendant-Appellant Anthony Cioffi, Jr. ("Appellant") with: (1) two counts of gross sexual imposition, R.C. 2907.05(A)(4), felonies of the third degree and (2) one count of kidnapping, R.C. 2905.01(A)(2), an aggravated felony of the second degree. This case, No. 95-CR-696, was assigned to the docket of Judge John M. Stuard.

While this case was pending, the Trumbull County Grand Jury returned a second indictment, case No. 96-CR-599, on September 27, 1996, charging Appellant with: (1) three counts of rape, R.C. 2907.02(A)(1)(b)(2), aggravated felonies of the first degree with life specifications, and (2) three counts of gross sexual imposition, R.C. 2907.05(A)(4), felonies of the third degree. This case was assigned to the docket of Judge Mitchell F. Shaker.

On December 3, 1996, the date Appellant was scheduled to go to trial by jury in case No.

95-CR-696, Appellant decided to enter into a plea agreement regarding both indictments. At the request of counsel, Judge Shaker transferred case No. 96-CR-599 to Judge Stuard. (T.d.# 20). Appellant then entered into plea agreements covering both indictments. (T.d. # 21, 49). The State dismissed the life specifications, and Appellant then pled to three counts of rape and three counts of gross sexual imposition. Upon acceptance of Appellant's pleas, the Court sentenced him on December 6, 1996. (T.d. # 25, 55).

In the first case, Appellant was sentenced to one year imprisonment on the gross sexual mposition to run concurrent to three to fifteen years of imprisonment on kidnapping. The second count of gross sexual imposition was dismissed. These sentences were to run concurrent to the sentence in 96-CR-599. (T.d. # 55).

In the second case, Appellant, was sentenced to 10 to 25 years on each of the three Rape counts to run concurrently with each other and to run concurrently with one year imprisonment on the three counts of gross sexual imposition to run concurrently with each other. (T.d.# 25).

Appellant filed a Motion to Set aside Judgment of Conviction and to Withdraw Pleas of Guilty on March 16, 2001. (T.d.# 61). An evidentiary hearing on that motion was held on January 31, 2002, and the decision of the Court below overruling the motion was issued on March 11, 2002. (T.d.# 66).

Appellant filed timely notice of appeal, and followed with his brief, which was filed on July 30, 2002. The Plaintiff-Appellee The State of Ohio ("State") files this brief in response.

Statement of the Facts

Defendant-Appellant, Anthony Cioffi, Jr., ("Appellant") retained Attorney Thomas E. Zena ("Attorney Zena") to represent him in the initial indictment, returned by the Trumbull

County Grand Jury on November 17, 1995, in Case No. 95-CR-696, regarding two counts of Gross Sexual Imposition and one count of Kidnapping; the case to be heard before Judge John M. Stuard. While this case was pending, a second indictment, Case No. 96-CR-599, was returned. This case was assigned to the docket of Judge Mitchell F. Shaker, and Attorney Zena again served as counsel for the Appellant. On December 3, 1996, Appellant was scheduled to go to trial by jury regarding the first indictment. Prior to that time, Attorney Zena had discussions with Appellant regarding his options, the possibility of entering into a plea bargain, what Appellant wanted to do and his concerns regarding those actions. (T.d.# 68, T.p. 34). Attorney Zena was in the process that morning of going over issues related to that case with Judge Stuard; discussions of trial procedure and Children Services Board Records. They were interrupted numerous times by someone sent by Appellant saying "[H]e has to see you right now. He's changed his mind." (T.d.# 68, T.p. 58-59). Attorney Zena went to Appellant and he, Appellant, said "I want to plead....I want to get this done. What is the best deal we can do? There's no way I can beat all of these." (T.d. # 68, T.p. 60). Attorney Zena responded by saying "Tony, let's take them one at a time. I know Shaker wants to put you into trial right after this is done. I won't let that happen." (T.d.# 68, T.p. 60). Attorney Zena told Appellant "Don't let that case being set now scare you, because we're not going to go." But Appellant responded by insisting: "Let's package them and get them done...No, I can go for the rest of my life." (T.d.# 68, T.p. 67).

Upon his client's adamant requests to plead rather than risk two trials and three possible life sentences, Attorney Zena then went to speak with Appellant's father and family about what was going to happen. Attorney Zena then met with Assistant Prosecuting Attorney Tom Wrenn

and asked him, "Is there still a way to resolve this case?" Both attorneys then went to Judge Shaker about his case, which he agreed to transfer to Judge Stuard's court. (T.d.# 68, T.p. 61). Attorney Zena then went to Appellant and informed him that the case had been transferred and the plea agreement happened after Attorney Zena spent considerable time talking with Appellant about it. (T.d.# 68, T.p. 62). At the plea hearing, the Court proceeded to engage in an extensive Crim. R. 11 plea colloquy with the Appellant to ensure that he understood what was going on, and, that he waived re-presentment of the matter to a Grand Jury.

It is clear from the transcript of the plea proceedings that Appellant was thoroughly advised of all his Crim. R. 11 rights and waived same.[1] Indeed, Appellant concedes in his brief that he was properly advised of all his Crim. R. 11 rights and in no way suggests that there were any irregularities in the court's colloquy or in the signed plea agreements. (Appellant's Brief at 12). While he now challenges Attorney Zena's preparedness for trial on the second indictment, Appellant expressed his satisfaction with Attorney Zena's representation at the time of his plea. (State's Ex. 3, p. 17, T.d # 21 & 49).

Nevertheless, Appellant filed a motion to withdraw the guilty pleas entered during the plea hearing December 3, 1996. As will be discussed in further detail in the Argument portion of this brief, Appellant called two witnesses at that hearing held January 31, 2002: Attorney Zena and Thomas Walter, a licensed psychologist. Curiously, Appellant himself offered no testimony. Further details will be presented to the Court as necessary in the Argument portion of this brief.

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[1]The transcript of the plea hearing is available for this Court's review as it was entered as State's Ex. 3 during the Hearing on Motion to Vacate Judgment of Conviction and to Withdraw Plea.

ARGUMENT

APPELLANT'S ASSIGNMENT OF ERROR NO. I: The trial court erred in overruling Defendant-Appellant's motion to set aside judgments of conviction and to withdraw pleas of guilty.

ISSUE PRESENTED FOR REVIEW AND ARGUMENT: Appellant can demonstrate no abuse of discretion in the trial court's overruling his Crim. R. 32.1 motion when Appellant insisted his trial counsel negotiate the plea agreement which the Appellant now seeks to withdraw.

In his sole assignment of error, Appellant argues that the trial court erred in overruling his motion to set aside judgments of conviction and to withdraw his pleas of guilty. This argument is without merit.

Appellant asserts that he did not knowingly, voluntarily and intelligently waive his trial rights and enter pleas of guilty to the offenses charged because of his trial counsel's alleged failure to investigate and evaluate the strengths and weaknesses of at least one of the cases (the life rape prosecution) to which Appellant pled. It should first be noted that Appellant did not challenge the validity of his plea until four full years after the trial court imposed sentence. The case law and the Criminal Rules are clear: in order to withdraw a guilty plea after sentencing, the criminal defendant must establish that a manifest injustice occurred at the time of the plea. The burden of establishing the existence of a manifest injustice is squarely upon the defendant seeking the vacation of the plea. *State v. Smith* (1977), 49 Ohio St.2d 261, at paragraph one of the syllabus, Crim. R. 32.1

The term injustice is defined as "[t]he withholding or denial of justice. In law, the term is almost invariably applied to the act, fault, or omission of a court, as distinguished from that of an individual." *State v. Hartzell* (1999) Montgomery App. No 17499, 1999 WL 957746, at 2,

citing *Black's Law Dictionary*, 5th *Ed.* A "manifest injustice" comprehends a fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the resulting prejudice through another form of application reasonably available to him or her. *Hartzell, supra,* at 2.

Furthermore, a motion made pursuant to Crim.R. 32.1 is addressed to the sound discretion of the trial court, and the good faith, credibility, and weight of the movant's assertions in support of the motion are matters to be resolved by that court. *State v. Stumpf* (1987), 32 Ohio St.3d 95, 104. Furthermore, a post-sentence Crim.R. 32.1 motion to withdraw a guilty plea is granted only in extraordinary cases. *Smith, supra,* at 264. An appellate court's review is limited to a determination of whether the trial court abused its discretion by denying the motion to withdraw a guilty plea. *State v. Barnett* (1991), 73 Ohio App.3d 244, 250. An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Montgomery* (1990), 61 Ohio St.3d 410, 413.

Although there is no time limit for filing a Crim.R. 32.1 motion, the Supreme Court of Ohio has expressly held that "[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." *Smith, supra*, at paragraph three of the syllabus; see, also, *State v. Jackson* (2000), Trumbull App. No. 98-T-0182, 2000 WL 522440, at 2. The Defendant, in *Smith*, waited only three years to withdraw his plea, and the court found his claim lacking in credibility.

Also, in *State v. Scarnati* (2002), Portage App. No. 2001-P-0063, 2002 WL 255502,

where appellant waited four years into his prison sentence before asserting the argument in his Crim.R. 32.1 motion that the trial court failed to inform him that the offense was not probationable, this Court held that the undue delay of more than four years to assert the claim of innocence affects the appellant's credibility and weighs against granting appellant's Crim.R. 32.1 motion to withdraw his plea. *Scarnati, supra,* at 7.

The Court is presented with a similar situation in the case *sub judice.* Appellant has failed to demonstrate that a manifest injustice has occurred. There is nothing upon which to conclude that Appellant's guilty plea was not knowing, intelligent, and voluntary. Appellant's own trial attorney testified, stating: "I don't have any doubt that he knew what we were here about or how it was going to be handled. Not only because I explained it to him, but in comments that Tony made to me throughout these proceedings." (T.d.# 68, T.p. 85).

Appellant's counsel, Attorney Thomas Zena, even attempted to dissuade Appellant from entering a plea to the charges in the second indictment saying, "Tony, let's take them one at a time. I know Shaker wants to put you into trial right after this is done. I won't let that happen.... Let's just worry about this case." (T.d. # 68, T.p. 60). Not only did Appellant's counsel never ask, nor push Appellant to plead (T.d.# 68, T.p. 63), he attempted to persuade Appellant to wait with regards to the second case.

While Appellant never specifically uses the term "ineffective assistance of counsel" in his brief, it is clear that Appellant seeks to withdraw this plea because of a purported Sixth Amendment violation. At the crux of this argument is Attorney Zena's supposed failure to discuss with him the contents of a letter from D & E Counseling Center wherein two of Appellant's victims in the second indictment had, at one time, denied that abuse had occurred.

(Defendant's Ex. A).

It is well-settled law that a properly licensed attorney is presumed to have rendered effective assistance to his client. *State v. Smith* (1985), 17 Ohio St. 3d 98, 100. To demonstrate ineffective assistance of trial counsel in the context of a guilty plea, a criminal defendant must show (1) counsel's performance was deficient and (2) the defendant was prejudiced by the deficient performance and that there is a reasonable probability that, but for counsel's error(s), the defendant would not have pled guilty. *State v. Madeline* (March 25, 2002), Trumbull App. No. 2000-T-0156, 2002 WL 445036, at 3.

The State submits Attorney Zena's performance was not deficient. The record reflects that Attorney Zena could not recall, four years and an untold number of criminal clients later, if he had reviewed the D&E Counseling letter with Appellant. (T.d. #68, T.p. 38, 93). However, the record also demonstrates that the State supplied Attorney Zena with a copy of the D&E letter during the discovery process. (T.d. #68, T.p. 92; State's Ex. 1). Attorney Zena testified that if he had the letter in his possession, he would have discussed its content with Appellant and made a copy for him. (T.d #68, T.p. 90-91) "I don't recall if I had that (Defendant's Ex. A). If I have, my client would have a copy of it. That is my standard practice." (T.d. #68, T.p. 38).

In the Judgment Entry of the Court, Judge Stuard wrote, "[i]t is apparent that Defendant knew the possibility existed that a potentially viable defense could be constructed, but his decision was made to get a sure commitment and counsel at Defendant's insistence obtained the commitment. This Court finds no basis from the totality of circumstances presented to find manifest injustice occurred." (T.d. # 66). As such, the State submits Appellant at worst demonstrated that Attorney Zena's memory was deficient, not his performance.

Furthermore, pursuant to *Madeline,* Appellant has never argued that but for the information contained in Defendant's Ex. A, B or C, he would not have entered his plea. Appellant did not argue in his motion (T.d.# 61), his closing arguments at hearing (T.d # 68, T.p. 159-162), or in his brief that had Attorney Zena discussed these exhibits with him there is a reasonable probability that he would not have pled guilty. Indeed, this Court held in *Madeline* that the defendant waived any claim to raise an ineffective assistance of counsel claim because his plea was entered into knowingly and voluntarily, despite claims that he had been rushed into a plea before formal discovery was conducted. "[A]ppellant's guilty plea represents a break in the events preceding it." *Madeline, supra,* at 5. It cannot go without saying that Appellant never testified at his evidentiary hearing. Despite opportunity to do so, he never told the court that he was unaware of the potential defense, and as a result now wishes to withdraw his plea and to take either or both indictments to trial. Therefore, Appellant fails to articulate a colorable claim of ineffective assistance of counsel.

Appellant's claim that he is not cognitively capable of making an intelligent, voluntary, and knowing decision regarding his guilty pleas is equally without merit. At the evidentiary hearing in the Court below, a licensed psychologist, Thomas Walter, who is *not a doctor,* testified on Appellant's behalf. Mr. Walter found Appellant to possess street knowledge and that he was not mentally retarded. (T.d.# 68, T.p. 151). While Appellant was found to be learning disabled with an I.Q. of 75, Mr. Walter concurred that Appellant's intellectual ability possibly exceeded what his I.Q. revealed. (T.d.# 68, T.p. 145).

Contrary to Appellant's claim in his brief, Appellant's situation is not analogous to the *State v. Mikulic* (1996), 116 Ohio App.3d 787. Unlike Appellant, Mikulic suffered from

"extensive psychiatric history, including psychiatric hospitalization." Appellant can make no such claim. Indeed, Attorney Zena testified he could not even justify filing a motion to determine Appellant's competency to stand trial because it was evident Appellant understood the proceedings at hand: (T.d. # 68, T.p. 85).

> Atty. Zena: "I don't have any doubt that he knew what we were here about or how it was going to be handled. Not only because I explained it to him, but in comments that Tony made to me throughout these proceedings."

Id.

The State submits Appellant presents a mirror image of the defendant in *State v. Wallace* (2000), Montgomery App. No. 18018, 2000 WL 569947. Wallace claimed he was pressured by defense counsel into pleading guilty and that his learning disabilities and inability to read made it difficult for him to understand what transpired at the plea proceeding. However, the record of the guilty plea proceeding affirmatively refuted those assertions. When defendant entered his guilty pleas "the trial court scrupulously complied with all of the requirements in Crim.R. 11(C)(2) in accepting those guilty pleas. It is precisely because Wallace is a slow learner and has a very limited ability to read that...the trial court carefully and meticulously went over each and every item in Crim.R. 11(C)(2) with Wallace, making certain that Wallace understood the various rights he was giving up and the consequences of his decision to plead guilty." *Id.* at 2. The evidence presented at the hearing on defendant's motion to withdraw his guilty pleas revealed that, although defendant suffered from *learning disabilities*, he was not mentally retarded. *Id.* Defendant understood matters that were adequately explained to him, and he understood the adversarial judicial process, in part because of his extensive prior experience. *Id.*

Appellant's own "expert" testified that someone who had been through the legal process

before, as Appellant has, would have a better chance of knowing what is being said. (T.d.# 68, T.p. 151). He also testified that Appellant understood the difference between guilty and not guilty (T.d.# 68, T.p. 154) and that he would understand the difference between 15 years and the rest of his life. (T.d.# 68, T.p. 155). Both the transcript of the plea hearing (State's Ex.3) and the signed plea agreements (T.d. # 21, 49) indicate his satisfaction with Attorney Zena and his understanding of his right to a jury trial, witness confrontation, compulsory process, his right against self-incrimination, and the State's burden to prove his guilt beyond a reasonable doubt.

As in *Wallace*, the court painstakingly went over each item of the pleas and asked Appellant if he understood what he had been told by the Court, and, at least five times, Appellant responded that he did understand. (State's Ex. 3, p. 13, 14, 16, 17, 18). He was also asked if he "had sufficient time to discuss what you are doing and the ramifications thereof with your Attorney, Mr. Zena." The Appellant responded, "Yes." (State's Ex. 3 p. 17). In both plea agreements, signed by Appellant, he stated his counsel had investigated the facts of the case and discussed same with him. (T.d.# 21 & 49, p. 2).

Despite Appellant's protestations now to the contrary, Appellant was not some hapless, uninformed, uneducated criminal defendant who entered his plea solely at the cajoling of an unprepared attorney. The record is patently clear that Attorney Zena was ready to proceed to trial on the first indictment when Appellant not only insisted that Attorney Zena seek a plea agreement in that case, but on the second indictment as well. It is also clear that Appellant received the benefit of the bargain in this matter as he saw three potential life sentences, which could have been imposed consecutively, evaporate into three 10 to 25 year sentences which were imposed concurrently. Furthermore, the record is clear that while Attorney Zena attempted to

dissuade Appellant from pleading in the second case, Appellant insisted on proceeding with a plea when he learned that the case had been transferred from Judge Shaker to Judge Stuard because he believed Judge Shaker would deal with him more harshly. "And he didn't have some complimentary things to say about Shaker. It is not important, but he had no confidence in Shaker or his judicial temperament or his ability." (T.d. #63, T.p. 60). Attorney Zena testified Appellant wanted to jump on a plea agreement in Judge Stuard's court so "Shaker doesn't pull the rug out from under me." (T.d. #63, T.p. 61). It could not be more obvious our "learning disabled" Appellant went judge shopping on Dec. 3, 1996, and was more than eager to accept a plea agreement with both cases before Judge Stuard.[2]

For the reasons stated above, Appellant has not met his burden of demonstrating the existence of an extraordinary situation to correct a manifest injustice. His delay of four years in even bringing this claim to the court below should cause this Court to look upon this case with a jaundiced eye. He demonstrates no abuse of discretion on the part of the trial court. Therefore, the trial court properly denied Appellant's Crim.R. 32.1 motion to withdraw his guilty plea.

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[2]It should not go unnoticed that Appellant waited until after Judge Shaker retired from the bench before filing his motion to withdraw guilty plea.

CONCLUSION

The State urges this Court to affirm the trial court's decision to overrule Appellant's motion to withdraw guilty plea.

Respectfully submitted,
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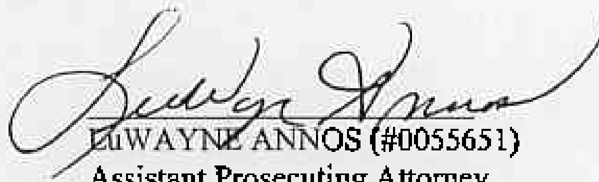

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