

[Cite as *State v. Banks*, 2011-Ohio-2749.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	Nos. 10AP-1065, 10AP-1066, and 10AP-1067
v.	:	
	:	(C.P.C. No. 08CR-07-5359)
Andre R. Banks,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 7, 2011

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV*,
for appellee.

Andre R. Banks, pro se.

APPEALS from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} In these consolidated cases, Andre R. Banks, defendant-appellant, appeals from judgments of the Franklin County Court of Common Pleas, in which the court denied his motion for post-conviction relief, motion to vacate sentence, and motion to withdraw guilty plea.

{¶2} On July 1, 2007, appellant was driving under the influence of alcohol and marijuana when he drove left of center and struck another vehicle. The driver of the other

vehicle was seriously injured; the driver's husband, who was the front seat passenger, was killed; and their two children were injured. After the accident, appellant's blood was tested, revealing a blood-alcohol concentration of .138 grams and 27.97 nanograms per milliliter of marijuana in his system. On July 23, 2008, appellant was indicted on two counts of aggravated vehicular homicide, one of which was a first-degree felony and one of which was a second-degree felony; three counts of aggravated vehicular assault, which were second-degree felonies; three counts of vehicular assault, which were third-degree felonies; and two counts of driving under the influence of alcohol or drugs, both of which were first-degree misdemeanors. All of the felony counts included specifications that appellant had been operating his vehicle while he was under a license suspension.

{¶3} On January 5, 2009, appellant plead guilty to one count of aggravated vehicular homicide and two counts of aggravated vehicular assault, none of which included specifications for driving under a suspended license. The aggravated vehicular homicide charge was reduced from a felony of the first degree to a felony of the second degree as the result of the agreed removal of the part of the charge indicating that appellant was driving under a license suspension. The aggravated vehicular assault charges were also reduced by a single degree as the result of the removal of the specification with respect to driving under a license suspension. A judgment entry finding appellant guilty was issued February 3, 2009. Appellant appealed the judgment, and this court affirmed the judgment in *State v. Banks*, 10th Dist. No. 09AP-224, 2009-Ohio-5582.

{¶4} On January 14, 2010, appellant filed a petition for post-conviction relief. On March 4, 2010, appellant filed a motion to vacate judgment and sentence. On July 19, 2010, appellant filed a motion to withdraw guilty plea. The trial court denied appellant's

petition for post-conviction relief on October 14, 2010. The trial court denied appellant's motion to vacate sentence and motion to withdraw guilty plea on October 18, 2010. Appellant appealed the judgments of the trial court, and this court consolidated the appeals. Appellant asserts the following assignments of error:

[I.] Trial Counsel was ineffective for failing to raise defects in the indictment, pursuant to Ohio R. Crim.P. 12(C)(2), resulting in Plain Error as articulated under Ohio R. Crim. P. 52(B), because the indictment inaccurately stated that "the offender was driving under a suspension imposed under chapter 4510, or any other provisions of the Ohio Revised Code," and this Plain Error prejudiced Appellant, permeated the entire proceeding, and denied Appellant's substantial rights to due process, guaranteed under VI and XIV Amendments of the U.S. Constitution.

[II.] Trial Counsel was ineffective for failing to raise, or object to, the admissibility of the weight of the Blood Alcohol level of Appellant, where the State did not show that the tests were conducted and collected in accordance with Section 4511.19 and 1547.11 of the Ohio Revised Code, and Sections 3701-53-05 and 3701-53-09 of the Ohio Administrative Code, denying Appellant's due process; VI and XIV Amendments of the U.S. Constitution.

[III.] Trial Counsel was ineffective, in violation of the Ohio Rules Of Professional Conduct and Ethics, when he appeared, without appellant, and filed a Notice of a Change of Plea, without the knowledge or consent of Appellant, denying Appellant due process under VI and XIV Amendments.

[IV.] Trial Counsel was ineffective when he allowed Appellant to plea to Aggravated Counts of the offenses, without relying predicate offense convictions, or a plea of guilt to relying predicate charges, denying Appellant due process under VI and XIV Amendments of the U.S. Constitution.

[V.] Trial Court erred by denying Appellant an evidentiary hearing in Post-conviction Relief Petition, and stating his grounds, outside of the record and unable to raise on direct appeal, were barred by res judicata, denying Appellant

substantive rights to due process under VI and XIV of the U.S. Const.

[VI.] Trial Court did err by denying Appellant's Motion to Withdraw his Plea, as he received ineffective assistance of counsel and his plea was coerced, further denying substantive rights to due process under VI and XIV of the U.S. Const[.]

[VII.] The trial court failed to issue findings of fact and conclusions of law in its denial of Appellant's petition for post-conviction relief.

{¶5} We first address appellant's seventh assignment of error. Appellant argues that the trial court failed to issue findings of fact and conclusions of law, as requested by appellant. A decision or order dismissing a petition for post-conviction relief is not a final appealable order until the trial court files the requisite findings of fact and conclusions of law. See *State v. Lester* (1975), 41 Ohio St.2d 51, 55. When a trial court dismisses a post-conviction relief petition without holding an evidentiary hearing, it must enter findings of fact and conclusions of law. R.C. 2953.21(C). "While a trial court need not discuss every issue that the petitioner raises or engage in an elaborate and lengthy discussion in its findings of fact and conclusions of law, its findings must be sufficiently comprehensive and pertinent to the issues to form a basis upon which the evidence supports the conclusion." *State v. McKnight*, 4th Dist. No. 06CA645, 2006-Ohio-7104, ¶5, citing *State v. Calhoun*, 86 Ohio St.3d 279, 291-92, 1999-Ohio-102.

{¶6} As the Supreme Court of Ohio noted in *State v. Mapson* (1982), 1 Ohio St.3d 217, 219, important policy considerations underlie the requirement of findings of fact and conclusions of law, including to apprise petitioner of the grounds for the judgment of the trial court and to enable the appellate courts to properly determine the issues on

appeal in such a cause. *Id.*, citing *Jones v. State* (1966), 8 Ohio St.2d 21, 22. "The existence of findings and conclusions are essential in order to prosecute an appeal. Without them, a petitioner knows no more than he lost and hence is effectively precluded from making a reasoned appeal. In addition, the failure of a trial judge to make the requisite findings prevents any meaningful judicial review, for it is the findings and the conclusions which an appellate court reviews for error." *Id.*

{¶7} The findings of fact and conclusions of law should be clear, specific, and complete. *State v. Brust* (Nov. 20, 1995), 4th Dist. No. 95CA551. They should be comprehensive and pertinent to the issues presented, demonstrate the basis for the decision, and be supported by the evidence. *Calhoun* at 292. While the trial court need not specifically designate parts of its decision as "findings of fact" and "conclusions of law," the underlying rationale for the trial court's decision must be sufficiently clear to allow for meaningful appellate review. *State v. Knott*, 4th Dist. No. 03CA6, 2004-Ohio-510, ¶8; *State v. Grigsby*, 2d Dist. No. 02CA16, 2003-Ohio-2823, ¶12-14.

{¶8} In the present case, the trial court did not expressly make "findings of fact" or expressly state "conclusions of law" in its decision. Notwithstanding, the trial court's decision clearly reflects its rationale for denying appellant's petition. Thus, it is a final, appealable order, and we shall address appellant's remaining assignments of error. Therefore, appellant's seventh assignment of error is overruled.

{¶9} Appellant argues in his first assignment of error that the trial court erred when it denied his petition for post-conviction relief on the issue of his counsel's ineffectiveness for failing to contest defects in the indictment. Specifically, appellant contends his trial counsel was ineffective when he failed to contest the defects in the

indictment that alleged appellant was driving under a suspended license because appellant had, in fact, a valid driver's license on the date of the accident. As evidence, appellant attached to his petition a copy of his driver's license, which had been issued three days before the accident in question.

{¶10} A trial court may rule on a post-conviction petition without first holding a hearing. Proper grounds for dismissing a petition for post-conviction relief without holding an evidentiary hearing include: (1) the failure of the petitioner to set forth sufficient operative facts to establish substantive grounds for relief, and (2) the operation of res judicata to bar the constitutional claims raised in the petition. *Calhoun* at paragraph two of the syllabus; *State v. Lentz*, 70 Ohio St.3d 527, 1994-Ohio-532. Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on an appeal from that judgment. *State v. Perry* (1967), 10 Ohio St.2d 175. A petition for post-conviction relief may defeat the res judicata bar only if its claims are based upon evidence outside the record. *State v. Cole* (1982), 2 Ohio St.3d 112, 113-14. Similarly, regarding claims of ineffective assistance of trial counsel in post-conviction proceedings, the Supreme Court of Ohio has stated that where a defendant, represented by different counsel on direct appeal, fails to raise in the direct appeal the issue of competent trial counsel and said issue could fairly have been determined without resort to evidence outside the record, res judicata is a proper basis for dismissing defendant's petition for post-conviction relief. *Id.* at syllabus.

{¶11} An appellate court reviews a ruling on a post-conviction petition for an abuse of discretion. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679. An abuse of discretion is found only when it is determined that a trial court's attitude in reaching its judgment was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶12} Furthermore, the Sixth Amendment to the United States Constitution guarantees a criminal defendant the effective assistance of counsel. *McMann v. Richardson* (1970), 397 U.S. 759, 771, 90 S.Ct. 1441, 1449. Courts employ a two-step process to determine whether the right to effective assistance of counsel has been violated. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.*

{¶13} An attorney properly licensed in the state of Ohio is presumed competent. *State v. Lott* (1990), 51 Ohio St.3d 160, 174. The defendant has the burden of proof and must overcome the strong presumption that counsel's performance was adequate or that counsel's action might be sound trial strategy. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. In demonstrating prejudice, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus.

{¶14} In denying appellant's petition for post-conviction relief in the present case, the trial court found that the attached copy of appellant's driver's license was not evidence to support his various claims. We agree that the fact that appellant may have possessed a valid driver's license does not aid his argument. Appellant asserts that he told his trial counsel about the valid driver's license, and his trial counsel should have "rectified" this "defect" in the indictment. However, appellant cannot establish prejudice. Appellant was not found guilty of any of the specifications for driving under a suspended license. The specifications were dismissed as part of the plea agreement. There is no right to an evidentiary hearing on a petition for post-conviction relief when the defendant fails to demonstrate prejudice. See *State v. Jackson* (1980), 64 Ohio St.2d 107, 111 (broad assertions without a further demonstration of prejudice do not warrant a hearing for all post-conviction relief petitions). Thus, we find appellant could have suffered no prejudice resulting from any "defect" in the indictment, and we overrule his first assignment of error.

{¶15} Appellant's second assignment of error raises an issue addressed in both appellant's petition for post-conviction relief and his motion to withdraw guilty plea. Crim.R. 32.1, which governs motions to withdraw guilty pleas, provides that a court may set aside a judgment of conviction and permit the defendant to withdraw a guilty plea only to correct manifest injustice. The Supreme Court of Ohio has defined "manifest injustice" as a "clear or openly unjust act." *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 1998-Ohio-271. Under this standard, a post-sentence withdrawal motion is allowable only in extraordinary cases. *State v. Smith* (1977), 49 Ohio St.2d 261, 264, citing *United States v. Semel* (C.A.4, 1965), 347 F.2d 228. The movant bears the burden of establishing a manifest injustice. *Id.* The decision of whether to grant or deny a motion to

withdraw a guilty plea 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. *Id.*, citing *United States v. Washington* (C.A.3, 1965), 341 F.2d 277. Thus, we will not reverse a trial court's decision to grant or deny a post-sentence motion to withdraw a guilty plea unless the trial court abused its discretion, i.e., the court's decision was unreasonable, arbitrary or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157-58.

{¶16} In the present case, appellant contends his trial counsel should have raised the issue that alcohol was used on his skin as an antiseptic when he had his blood collected for testing, in contravention of the Ohio Administrative Code and Ohio Revised Code. Appellant claims he informed his trial counsel that an alcohol swab had been used by the hospital to collect the blood sample. However, a petitioner is not entitled to a hearing if his claim for relief is unsupported by any operative facts other than defendant's own self-serving affidavit, which alone is legally insufficient to rebut the record on review. *State v. Kapper* (1983), 5 Ohio St.3d 36, 38. See also *State v. Mayrides*, 10th Dist. No. 03AP-347, 2004-Ohio-1623 (self-serving affidavits submitted by appellant are not sufficient to trigger a post-conviction hearing), citing *State v. Steffen* (May 11, 1994), 1st Dist. No. C-930351; *State v. Clark*, 10th Dist. No. 01AP-670, 2001-Ohio-3973 (appellant's self-serving affidavit is insufficient to allow post-conviction relief). Here, although in his affidavits attached to his motion and petition appellant indicates the hospital used alcohol to sterilize his skin before taking his blood sample, and he did not know that the use of alcohol swabs during blood testing was prohibited, appellant did not specifically allege in his affidavits that he told his counsel that alcohol was allegedly used on him during his

testing. Thus, appellant's supporting evidence on this issue was lacking. Nevertheless, the trial court could have found any claim in this regard dubious, as appellant would have had no reason to inform his counsel of this fact if he had been unaware of the law prohibiting such prior to his plea, as he averred. See *Calhoun* at 279 (in reviewing petitions for post-conviction relief, a trial court may, in the exercise of its sound discretion, weigh the credibility of affidavits submitted in support of the petition in determining whether to accept the affidavit as true statements of fact). Furthermore, although appellant attached certain medical records, he presented no outside evidence to support his contention that the hospital used alcohol as claimed. Appellant's bare, unsupported allegations in his petition, motion, and affidavits on these issues were insufficient to trigger a hearing on appellant's petition. Therefore, appellant's second assignment of error is overruled.

{¶17} Appellant argues in his third assignment of error that his trial counsel was ineffective because he filed a notice of change of plea without appellant's knowledge. This issue was raised in appellant's motion to withdraw guilty plea. In making this argument in his motion, appellant cites to his trial counsel's itemized bill, which indicates on December 22, 2008, his counsel appeared and "notified court of Change of Plea." He also cites to his wife's affidavit, in which she averred that she had no knowledge that his counsel had filed a change of plea prior to January 5, 2009. We have no record of what exactly transpired before the court on December 22, 2008, and appellant does not argue that a change of plea was, in fact, entered on that date. Indeed, the record reveals that, on December 22, 2008, the court entered a continuance until January 5, 2009 for a "trial." Thus, there is no dispute that a change of plea was not entered on December 22, 2008,

and appellant voluntarily agreed to plead guilty at the next hearing on January 5, 2009, without regard to any events that may have occurred on December 22, 2008. We can find no prejudice under these circumstances. Therefore, appellant's third assignment of error is overruled.

{¶18} Appellant's fourth assignment of error relates to issues raised in both appellant's petition for post-conviction relief and motion to withdraw guilty plea. Appellant argues that his trial counsel was ineffective because trial counsel allowed him to plead guilty to aggravated vehicular homicide and aggravated vehicular assault when he was not convicted of the "predicate offenses" of operating a motor vehicle under the influence of alcohol or driving without a license. However, this claim is barred by res judicata. Appellant could have raised this issue on direct appeal, and it could have been determined without resort to evidence outside the record. Therefore, appellant's fourth assignment of error is overruled.

{¶19} Appellant argues in his fifth assignment of error that the trial court erred when it denied him an evidentiary hearing on his petition for post-conviction relief, found his arguments were barred by res judicata, and rejected his affidavit because it was self-serving. In this assignment of error, appellant basically reargues all of his arguments from his petition for post-conviction relief, many of which we have already addressed in his other assignments of error. Beyond the arguments we have already addressed above, appellant also argues that his counsel was ineffective for failing to present facts that would have mitigated appellant's role in the accident, specifically that his steering linkage had snapped in a pothole prior to driving left of center and that the decedent's wife

indicated in a television interview/news article that the decedent grabbed the steering wheel prior to impact.

{¶20} We find appellant's contentions did not call for an evidentiary hearing. With regard to his counsel's failure to raise the mechanical problems with his vehicle at the sentencing hearing, appellant's counsel specifically addressed the mechanical condition of appellant's vehicle at the time of the accident. Appellant's counsel told the trial court that appellant's vehicle struck a pothole, there was no dispute that the vehicle had steering issues, and he believed the steering issues were a significant factor in the accident. The court then acknowledged the fact there may have been issues with appellant's car. Therefore, because appellant's counsel did raise this issue during sentencing, this argument is without merit.

{¶21} With regard to appellant's argument that the decedent's wife told a news reporter that decedent grabbed the wheel of the vehicle, and his trial counsel should have used this to mitigate appellant's role in the accident, we fail to find any prejudice in appellant's counsel's failure to present this fact to the trial court. Assuming trial counsel was aware of the interview/article, appellant's trial counsel may well have considered it a sound strategy not to shift any blame for the accident to the decedent. Further, his counsel may not have wished to present this article/interview because the remaining portion of the interview/article also indicates damaging statements from the decedent's wife that appellant's car was swerving back and forth across the center line. Appellant has failed to overcome the presumption that his counsel's action was sound trial strategy. See *Smith* at 100, citing *Strickland* at 694-95, 104 S.Ct. at 2065, citing *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 164.

{¶22} As for appellant's argument that post-conviction procedures do not provide an adequate corrective process, appellant fails to present any authority to support his contention, and we find it unpersuasive. We have before found that " '[t]his court and other Ohio appellate courts have rejected [claims] that Ohio's post-conviction statute does not afford an adequate corrective process.' " *State v. Conway*, 10th Dist. No. 05AP-550, 2006-Ohio-6219, ¶27, quoting *State v. Hessler*, 10th Dist. No. 01AP-1011, 2002-Ohio-3321, ¶73. For the foregoing reasons, appellant's fifth assignment of error is overruled.

{¶23} Appellant argues in his sixth assignment of error that the trial court erred when it denied his motion to withdraw guilty plea, as he received ineffective assistance of trial counsel, and his plea was coerced. We first note that, on October 8, 2010, appellant filed a motion to strike his motion to withdraw guilty plea on the basis that his motion was insufficient and may fall short of obtaining the relief requested due to technical shortcomings. Thus, any error that appellant now claims on appeal was invited by his filing of his motion to strike and admission that the motion was insufficient. Under the invited error doctrine, a party will not be permitted to take advantage of an error which he himself invited or induced the trial court to make. *State ex rel. Bitter v. Missig* (1995), 72 Ohio St.3d 249, 254. Notwithstanding, appellant's arguments are without merit. Most of the arguments appellant raises in this assignment of error are the same arguments we have already addressed and rejected in appellant's first, second, third, fourth, and fifth assignments of error.

{¶24} Appellant also raises in this assignment of error the contention that the trial court wrongly considered, for purposes of sentencing, the dismissed counts for driving under the influence of alcohol or drugs and the specifications for operating a vehicle while

his license was suspended. We first note that, because appellant could have raised this on direct appeal without resorting to outside evidence, the issue is barred by res judicata. Nevertheless, in sentencing a defendant, a court may consider charges that did not result in a conviction, including charges that were dismissed by the state pursuant to a plea agreement. *State v. Wiles* (1991), 59 Ohio St.3d 71, 78. See also *State v. Bowser*, 186 Ohio App.3d 162, 2010-Ohio-951, ¶16 (a sentencing court may consider a criminal charge and supporting facts that are dismissed under a plea agreement). "[N]o caselaw * * * would prohibit a trial judge from taking into account charges that are reduced or dismissed as a result of a plea bargain, [and] in fact, the history of Ohio law indicates that the sentencing judge may consider such factors." *State v. Starkey*, 7th Dist. No. 06 MA 110, 2007-Ohio-6702, ¶19.

{¶25} Appellant also claims that his guilty plea was coerced. Appellant asserts his trial counsel recommended he put himself at the mercy of the court, said that pleading guilty was "the only way," said if he did not plead guilty the judge would sentence him to the maximum prison terms, and recommended that he not put the decedent's family through a trial. However, there is no evidence that this advice was incorrect or misguided. It appears to be typical advice trial counsel might present to a defendant under these circumstances. Although appellant may not have liked the advice, an attorney's advice to take a plea deal is not ineffective assistance of counsel. *State v. Shugart*, 7th Dist. No. 08 MA 238, 2009-Ohio-6807, ¶37, citing *State v. Jones*, 7th Dist. No. 06 MA 17, 2008-Ohio-3352, ¶9. The attorney is there to give informed advice, to relate worst case scenarios to his client, and to make a recommendation, regardless of whether it upsets the client.

Shugart at ¶37. Therefore, we find this argument without merit. For these reasons, appellant's sixth assignment of error is overruled.

{¶26} Accordingly, appellant's seven assignments of error are overruled, and the judgments of the Franklin County Court of Common Pleas are affirmed.

Judgments affirmed.

FRENCH and TYACK, JJ., concur.
