IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellee, vs. JAMES D. CLINE, Defendant-Appellant.	:	Case No. 08-0357 On Appeal from the Geauga County Court of Appeals Eleventh Appellate District C.A. Case No. 2006-G-2735

JAMES D. CLINE'S MEMORANDUM IN SUPPORT OF JURISDICTION

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STATEMENT OF SUBSTANTIAL CONSTITUTIONAL QUESTIONS

In the case of *In Re Murchison* (1955), 349 U.S. 133, the United States Supreme Court eloquently stated that "[f]or any free civilization to survive and flourish, it is necessary that the citizenry perceive that they are being governed equitably, and a public trial, hedged with procedural protections and conducted with conspicuous respect for the rule of law serves to demonstrate that. Judges must therefore take great pains to avoid the appearance that any person is being "railroaded" by the criminal justice system. Otherwise, public confidence in the efficacy and fundamental fairness of the proceedings would be shaken and the people may lose faith in the government itself." In the instant case, the actions of the trial court threaten these very principles to the extent that an untrained observer would quite likely have perceived that the Defendant was being "railroaded."

Specifically, this case involves an indigent criminal defendant, James Cline, who believed that his attorney was dishonest and pursuing a hidden agenda with respect to plea negotiations. In the face of this reality, Mr. Cline made repeated efforts to explain to the trial court that he had been improperly represented and wanted to withdraw his guilty plea. Unfortunately, the trial court callously disregarded Mr. Cline's expressed desire to be heard on these issues. In so doing, the trial court deprived Mr. Cline of even the most basic form of due process secured by the federal and state constitutions. Therefore, this case presents the Court with an opportunity to address not only the legal errors in Mr. Cline's case, but to clarify for all trial courts in this state the proper level of due process to be afforded to indigent criminal defendants.

First, this case presents this Court with an opportunity to revisit its holding in *State v. Deal* (1969), 17 Ohio St.2d 17, and address the circumstances in which a trial court is required to

conduct an on-the-record inquiry into allegations of ineffectiveness of counsel made by an indigent accused. Specifically, this Court can clarify *Deal's* applicability to claims of improper representation made by an indigent defendant in the context of plea hearings. In so doing, this Court can reaffirm the importance of *Deal's* central holding—that an indigent defendant who believes that he or she has been denied effective representation shall have those beliefs, and the trial court's inquiry into the defendant's concerns, placed on the record for purposes of appellate review.

Second, this case presents this Court with an opportunity to revisit its holding in *State v. Xie* (1992), 62 Ohio St.3d 521. *Xie* requires that a hearing be held on any presentence motion to withdraw a guilty plea to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea. In this case, this Court has the opportunity to clarify the circumstances in which a *Xie* hearing must be held. Specifically, this Court can make clear that a formal written motion to withdraw a guilty plea is not required to trigger a *Xie* hearing. Rather, if a defendant, prior to sentencing, makes a clear and unequivocal expression of his or her desire to withdraw a guilty plea, the trial court is obligated to hold a hearing under the dictates of *Xie*.

Finally, the issues in this case go to the core foundations of our criminal justice system. In this case, an indigent criminal defendant stood before a public court and made every effort to convey to the presiding judge that his attorney was not providing proper representation and, as a result, that he wished to withdraw his guilty plea. Rather than take Mr. Cline's complaints seriously, the trial court interrupted him, chastised him, and refused to listen to any of his concerns. By not inquiring into the reasons for Mr. Cline's dissatisfaction, and by behaving the way he did, the judge gave the impression that he acted arbitrarily and that he did not care for the rights of the accused. This Court should not allow such a result to stand.

STATEMENT OF THE CASE AND FACTS

This case arises from a motor vehicle accident that occurred on March 2, 2006 in Geauga County, Ohio. On the night in question, Defendant-Appellant, James D. Cline was traveling on State Route 700 when his vehicle went left-of-center and struck an oncoming vehicle. As a result of the collision, two of the passengers in the oncoming vehicle died and a third was seriously injured. The State alleged that at the time of the accident Mr. Cline was under the influence of alcohol and eluding a police officer who was attempting to effectuate a traffic stop.

On March 17, 2006 the Geauga County Grand Jury issued a thirteen-count indictment against Mr. Cline. Specifically, Mr. Cline was charged with the following offenses: Counts One and Two, Aggravated Vehicular Homicide, both felonies of the first degree, and violations of R.C. 2903.06(A)(1)(a)(B)(2)(a)(i); Count Three, Aggravated Vehicular Assault, a felony of the second degree, and a violation of R.C. 2903.08(A)(1)(B)(1)(a); Count Four, Operating a Motor Vehicle While Under the Influence of Alcohol, a felony of the fourth degree, and a violation of R.C. 4511.19(A)(1)(a) with a specification alleging five or more prior OVI offenses within twenty years; Count Five, Operating a Motor Vehicle with a Prohibited Blood Alcohol Content, a felony of the fourth degree, and a violation of R.C. 4511.19(A)(1)(g) with the same specification as in Count Four; Count Six, Failure to Comply with the Order or Signal of a Police Officer, a felony of the third degree, and a violation of R.C. 2921.331(B)(C)(5)(a)(i); Counts Seven and Eight, Aggravated Vehicular Homicide, both felonies of the second degree, and violation of R.C. 2903.06(A)(2)(a)(B)(3); Count Nine, Aggravated Vehicular Assault, a felony of the third degree, and a violation of R.C. 2903.08(A)(2)(b)(C)(2); Counts Ten and Eleven, Involuntary Manslaughter, both felonies of the first degree, and a violation of R.C. 2903.04(A);

and Count Thirteen, Driving Under an OVI Suspension, a misdemeanor of the first degree, and a violation of R.C. 4510.14(A).

Mr. Cline subsequently agreed to plead guilty to the offenses charged in Counts One, Two, Three, Five, and Six in exchange for the State's agreement to dismiss the remaining eight counts in the indictment. During a change of plea hearing on July 31, 2006, the trial court accepted Mr. Cline's guilty plea as to Counts One, Two, Three, Five, and Six. The very next day, on August 1, 2006, Mr. Cline wrote a letter to the trial court attempting to withdraw his guilty plea.

The record reflects that the trial court received Mr. Cline's handwritten letter on August 3, 2006. In his letter, Mr. Cline specifically requested that the trial court enter a "motion to withdrawl [sic] my plea of guilty . . . and to continue the process of trial by jury." In support of his request, Mr. Cline accused his court-appointed attorney of being "less than honest with me in order to achieve a hidden agenda of which I knew nothing of until today." The trial court forwarded a copy of Mr. Cline's letter to his attorney on August 7, 2006. However, the court took no further action with respect to Mr. Cline's request to withdraw his plea or his allegation that he had received ineffective assistance from his court-appointed advocate.

Notwithstanding Mr. Cline's efforts to withdraw his guilty plea, the trial court proceeded with a sentencing hearing on September 6, 2006. During the sentencing hearing, Mr. Cline expressed concern that the plea agreement had not been followed and repeated his allegation that he was not properly represented by his court-appointed attorney. The trial court made absolutely no effort to inquire as to the reasons for Mr. Cline's expressed dissatisfaction with his counsel. In fact, the trial court expressly denied Mr. Cline the opportunity to describe, **on the record**, his concern that he had received ineffective assistance from his court-appointed counsel.

At the conclusion of the sentencing hearing, the trial court sentenced Mr. Cline to the maximum penalty for each count and further ordered that the sentences run consecutively. As a result, Mr. Cline received an aggregate sentence of thirty-eight years in prison. The Judgment of Conviction was journalized on September 12, 2006.

Mr. Cline filed a timely notice of appeal to the Eleventh District Court of Appeals. He presented two issues for review. On December 31, 2007 the court of appeals issued a decision, rejecting Mr. Cline's assignments of error, and affirming his conviction. Mr. Cline now brings his cause before this Court seeking a grant of jurisdiction and a reversal of the court of appeals' decision.

FIRST PROPOSITION OF LAW

If, at any time prior to pronouncement of a sentence, an indigent accused questions the effectiveness of assigned counsel, it is the duty of the trial court to inquire into the complaint and make such inquiry part of the record. Failure of the trial court to conduct such an inquiry contravenes the Due Process Clauses of the federal and state constitutions.

In *State v. Deal* (1969), 17 Ohio St.2d 17 at syllabus, this Court held: "[w]here, during the course of his trial for a serious crime, an indigent accused questions the effectiveness and adequacy of assigned counsel . . . it is the duty of the trial judge to inquire into the complaint and make such inquiry part of the record." In reaching this conclusion, the *Deal* Court emphasized that judicial inquiry into an indigent defendant's dissatisfaction with counsel is necessary to create a record of the facts underlying the complaint for the purpose of appellate review. Id. at 19. Thus, *Deal* imposed an "affirmative duty upon the trial court to inquire, **on the record**, into a defendant's complaints regarding the adequacy of his appointed counsel." *State v. Keith* (1997), 79 Ohio St.3d 514, 524 (emphasis added) (internal citation omitted).

In the wake of *Deal*, Ohio's appellate courts have reversed convictions when the trial court failed to make an on-the-record inquiry into objections about the performance of appointed counsel. See, e.g., *State v. King* (1995), 104 Ohio App.3d 434; *State v. Prater* (1990), 71 Ohio App.3d 78; *State v. Murphy* (Feb. 22, 2000), 5th Dist. No. 99 CA 48. Additionally, these courts have held that a proper *Deal* inquiry may be "brief and minimal," but it must be made. *Prater*, 71 Ohio App.3d at 83. In deciding whether a trial court complied with the requirements of *Deal*, an appellate court must ascertain whether the defendant was allowed "to place his allegations on the record" and whether the trial court conducted a "sufficient investigation into their merit to allow appellate review." *State v. Beranek* (Dec. 14, 2000), 8th Dist. No. 76260.

In this case, Mr. Cline informed the trial court on two distinct occasions that his appointed counsel was inadequate. In his letter to the trial court, Mr. Cline questioned the effectiveness of his appointed counsel when he unequivocally stated that his attorney had been "dishonest" and was motivated by a "hidden agenda." Additionally, at three separate points during his sentencing hearing, Mr. Cline expressly stated that he had been "improperly represented" by his court-appointed counsel.

The trial court tacitly acknowledged Mr. Cline's concern that he had been improperly represented, but did not afford him any opportunity to explain his complaint. More importantly, the trial court completely ignored its duty to conduct a *Deal* inquiry in response to Mr. Cline's statements regarding the deficient performance of appointed counsel. As a result of the trial court's failure to conduct an investigation into Mr. Cline's complaints, Mr. Cline was denied an opportunity to place his allegations on the record, which completely foreclosed the possibility of meaningful appellate review. This is precisely the outcome that *Deal* sought to prevent.

In this case the Eleventh District Court of Appeals found that the *Deal* holding did not apply to Mr. Cline's case because he raised his concerns regarding counsel at his sentencing hearing. The court of appeals based its holding on the erroneous conclusion that *Deal* "does not apply at sentencing hearings." *State v. Cline*, 11th Dist. No. 2006-G-2735, 2007-Ohio-7131, at ¶48. The decision of the Eleventh District is supported by neither the law of this Court nor the record in this case.

As an initial matter, Mr. Cline first raised concerns regarding the effectiveness of his appointed counsel in a letter to the trial court dated August 1, 2006, the day after he entered his guilty plea. The trial court acknowledged receiving this letter on August 3, 2006, which was more than one full month prior to his sentencing hearing. Thus, the Eleventh District's statement

that Mr. Cline "raised his concern about counsel at his sentencing hearing" is factually inaccurate. ¶48. Nonetheless, the timing of Mr. Cline's complaint was not dispositive of the issue before the court of appeals as nothing in *Deal* or its progeny supports the proposition that trial courts are obligated to inquire into only those complaints that are made prior to sentencing.

According to *Deal*, once Mr. Cline expressed concerns regarding appointed counsel, the trial court had an absolute duty to inquire into the nature of the complaint and to make such inquiry part of the record. Notwithstanding its obligations under *Deal*, in this case the trial court did not conduct any investigation into Mr. Cline's allegations that his appointed counsel was ineffective. Accordingly, the court of appeals' decision must be reversed in this case and remanded to the trial court for the purpose of inquiring into Mr. Cline's allegations regarding his appointed counsel.

SECOND PROPOSITION OF LAW

A trial court abuses its discretion by failing to conduct a hearing regarding an indigent defendant's desire to withdraw a guilty plea when the court has knowledge of the defendant's desire to withdraw the plea and has also been notified that appointed counsel may not be providing effective representation.

A presentence motion to withdraw a guilty plea should be freely and liberally permitted, but such a motion does not have to be automatically granted because there is no absolute right to withdraw a guilty plea prior to sentencing. *State v. Xie* (1992), 62 Ohio St.3d 521, 527. Instead, Crim.R. 32.1 requires that the trial court conduct a hearing on a motion to withdraw a guilty plea prior to sentencing "to determine whether there is a reasonable and legitimate basis for withdrawal of the plea." Id. Thus, "according to *Xie*, a trial court confronted with a motion to withdraw a guilty plea prior to sentencing *must* conduct a hearing to determine whether or not there was a reasonable and legitimate basis for the motion, and the failure to do so constitutes an abuse of discretion." *State v. Glavic* (2001), 143 Ohio App.3d 583, 589.

According to the court of appeals, "there is nothing in the record to suggest that Cline sought to withdraw his guilty plea." *Cline*, 2007-Ohio-7131 at ¶62. Therefore, the court of appeals found that "the trial court did not err by failing to address the absent motion." Id. at ¶64. Once again, the Eleventh District's decision misconstrues both the law and the facts of this case.

Mr. Cline concedes that a formal motion to withdraw his guilty plea was never entered in this case. Still, there is substantial evidence in the record to demonstrate that Mr. Cline attempted to withdraw his guilty plea prior to sentencing. For example, in his August 1, 2006 letter, Mr. Cline informed the trial court of his desire to enter a "motion to withdrawl [sic] my plea of guilty" and further stated that he wished to change his plea "to not guilty and to continue the process of trial by jury." Mr. Cline also explained that he was directing his request to the trial court due to his concern that his appointed attorney was not providing him competent counsel.

Moreover, the decision of the Eleventh District places far too onerous a burden on indigent defendants. According to the reasoning of the Eleventh District in this case, Mr. Cline needed to make a formal oral or written motion to withdraw his guilty plea in order to trigger the right to a hearing on that motion. This reasoning is particularly unsound in light of numerous appellate court decisions holding that defendants were entitled to a full and fair hearing on their motion to withdraw a guilty plea in circumstances in which no formal motion was submitted. See, e.g., *State v. Cuthbertson* (2000), 139 Ohio App.3d 895 (motion to withdraw guilty plea contained in a letter to the trial court); *State v. Glavic*, supra (oral motion to withdraw guilty plea at sentencing hearing); *State v. Bekesz* (1991), 75 Ohio App.3d 436 (oral motion to withdraw guilty plea at sentencing hearing). As the foregoing cases demonstrate, the critical issue is not whether a "formal motion" has been filed, but whether the trial court is aware of the defendant's

desire to withdraw his plea that triggers the trial court's duty to conduct a hearing to determine whether a reasonable and legitimate basis exists to withdraw the previously entered plea.

The record in this case establishes that Mr. Cline informed the trial court that he had not received adequate representation from his appointed counsel. As a result, Mr. Cline was forced to ask the trial court directly to withdraw his guilty plea. In these circumstances, Mr. Cline's letter to the court should have been treated as a motion to withdraw his guilty plea. These facts, coupled with the liberal rule that a motion to withdraw a guilt plea prior to sentencing should be freely allowed, compels the conclusion that the trial court abused its discretion in failing to conduct a hearing regarding Mr. Cline's desire to withdraw his guilty plea.

THIRD PROPOSITION OF LAW

When an appellate attorney fails to raise numerous, meritorious issues in a criminal defendant's one and only direct appeal, and when appellate counsel instead raises weak, unconvincing issues, the attorney renders constitutionally inadequate assistance, in contravention of the Fourteenth Amendment to the United States Constitution, and Section 16, Article I of the Ohio Constitution.

Due process requires the effective assistance of counsel on a first appeal of right. *Evitts v. Lucey* (1985), 469 U.S. 387, 396; Fourteenth Amendment, United States Constitution; Section 16, Article I, Ohio Constitution. In Ohio, the right to a first appeal is guaranteed. Section 3, Article IV, Ohio Constitutuion; R.C. 2953.02. Proper appellate review is necessary to ensure that a criminal conviction has been obtained through a reliable process. *Evitts*, 469 U.S. 387 at 399-400; *Griffin v. Illinois* (1956), 351 U.S. 12, 18. An important element of that process is the effective assistance of appellate counsel. Counsel is ineffective if the representation is constitutionally deficient, and the deficiency prejudices the defendant. *Strickland v. Washington* (1984), 466 U.S. 668, 687; *State v. Reed* (1996), 74 Ohio St.3d 534, 535.

Appellate counsel does not need to raise every nonfrivolous argument on appeal. *Jones v. Barnes* (1983), 463 U.S. 745, 754. However, counsel must exercise reasonable professional judgment. Id. at 753. The failure to raise a constitutional claim that has a reasonable probability of success constitutes ineffective assistance of appellate counsel. *Reed*, 74 Ohio St.3d at 535-36. In this case, Mr. Cline's appellate counsel failed to raise numerous meritorious issues, and instead raised weak unconvincing issues. Had appellate counsel raised those meritorious issues there is a reasonable probability that the case would have been remanded to the trial court for further proceedings on the motion to withdraw Mr. Cline's guilty plea and his allegations that he was provided ineffective assistance from trial counsel.

Specifically, appellate counsel failed to raise a meritorious issue challenging the trial court's failure to conduct a *Deal* inquiry. See First Proposition of Law, supra, incorporated herein by reference. Appellate counsel attempted to attack the trial court's failure to inquire into Mr. Cline's statements that he was not being properly represented. Rather than rely on *Deal*, a case from this Court directly on point, appellate counsel framed Mr. Cline's claim as a violation of his rights to allocution under Crim.R. 32. In fact, it was the court of appeals that ultimately raised the *Deal* case in its opinion affirming the judgment of the trial court. If this issue had been squarely presented to the appellate court, in the form of briefs and oral arguments, there is a reasonable probability that the court of appeals would have reached a different result.

In addition, appellate counsel failed to raise a meritorious issue that Mr. Cline did in fact submit a motion to withdraw his guilty plea to the trial court in the form of a written letter to the court. Rather than rely on this fact, appellate counsel attempted to twist certain questions that Mr. Cline had about the plea agreement into a motion to withdraw his plea. This weak argument was summarily rejected by the Eleventh District. However, if appellate counsel had presented

the complete factual background in conjunction with the relevant legal principles, there is a reasonable probability that disposition of Mr. Cline's appeal would have been different.

Accordingly, because Mr. Cline was deprived of his right to the effective assistance of appellate counsel, the court of appeals' decision must be reversed, and his case remanded to the appellate court for a new direct appeal with constitutionally effective assistance of counsel.

CONCLUSION

Mr. Cline respectfully requests that this Court accept jurisdiction over his case, and for the reasons stated in the First and Second Propositions of Law, reverse the decision of the Eleventh District and remand this case to the trial court for additional proceedings. For the reasons stated in the Third Proposition of Law, Mr. Cline requests that this Court reverse the decision of the Eleventh District and remand this case for a new direct appeal, with constitutionally effective assistance of counsel.

Respectfully submitted,

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JAMES D. CLINE

CERTIFICATE OF SERVICE

The undersigned counsel certifies that a copy of the foregoing MEMORANDUM IN SUPPORT OF JURISDICTION was served by ordinary U.S. Mail, postage-prepaid, this 14th day of February, 2008 to David P. Joyce, Geauga County Prosecutor, Geauga County Prosecutor's Office, Courthouse Annex, 231 Main Street, Suite 3A, Chardon, Ohio 44024.

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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No.
Plaintiff-Appellee,	:	
	:	On Appeal from the Geauga
vs.	:	County Court of Appeals
	:	Eleventh Appellate District
JAMES D. CLINE,	:	
	:	C.A. Case No. 2006-G-2735
Defendant-Appellant.	:	

APPENDIX TO JAMES D. CLINE'S
MEMORANDUM IN SUPPORT OF JURISDICTION

STATE OF OHIO)
) SS.
COUNTY OF GEAUGA)

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

JAMES D. CLINE,

Defendant-Appellant.

JUDGMENT ENTRY

CASE NO. 2006-G-2735

For the reasons stated in the opinion of this court, appellant's assignments of error are overruled. It is the judgment and order of this court that the judgment of the Geauga County Court of Common Pleas is affirmed.

JUDGE TIMOTHY P. CANNON

FOR THE COURT

12/473

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

STATE OF OHIO,	:	**OPINION**
Plaintiff-Appellee,	:	**CASE NO. 2006-G-2735**
- vs -	:	
JAMES D. CLINE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 06 C 000035.

Judgment: Affirmed.

David P. Joyce, Geauga County Prosecutor, and *Janette M. Bell* and *Susan T. Wieland*, Assistant Prosecutors, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Plaintiff-Appellee).

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TIMOTHY P. CANNON, J.

{¶1} Appellant, James D. Cline, appeals the judgment entered by the Geauga County Court of Common Pleas. Cline was sentenced to an aggregate prison term of 38 years for his convictions for aggravated vehicular homicide, aggravated vehicular assault, operating a motor vehicle under the influence of alcohol ("O.V.I."), and failure to comply with an order or signal of a police officer.

{¶2} On March 2, 2006, Cline was driving a pick-up truck on State Route 700 in Burton Township. His vehicle went left-of-center, striking a vehicle occupied by three college students. Two of the students died as a result of the accident, and the third student was severely injured.

{¶3} As a result of the incident, Cline was indicted on 13 individual counts. Counts 1 and 2 of the indictment charged Cline with aggravated vehicular homicide, in violation of R.C. 2903.06(A)(1)(a) and (B)(2)(a)(i), which are first-degree felonies. Count 3 of the indictment charged Cline with aggravated vehicular assault, in violation of R.C. 2903.08(A)(1)(a) and (B)(1)(a), which is a second-degree felony. Counts 4 and 5 of the indictment charged Cline with O.V.I., in violation of R.C. 4511.19(A)(1)(a) and 4511.19(A)(1)(g). These two counts alleged that Cline had five or more O.V.I. convictions in the past 20 years, thus they were charged as fourth-degree felonies. Count 6 of the indictment charged Cline with failure to comply with an order or signal of a police officer, in violation of R.C. 2921.331(B) and (C)(5)(a)(i), which is a third-degree felony. Counts 7 and 8 of the indictment charged Cline with aggravated vehicular homicide, in violation of R.C. 2903.06(A)(2)(a) and (B)(3), which are second-degree felonies. Count 9 of the indictment charged Cline with aggravated vehicular assault, in violation of 2903.08(A)(2)(b) and (C)(2), which is a third-degree felony. Counts 10 and 11 of the indictment charged Cline with involuntary manslaughter, in violation of R.C. 2903.04(A), first-degree felonies. Count 12 of the indictment charged Cline with driving under suspension in violation of R.C. 4510.11(A), which is a first-degree misdemeanor. Count 13 of the indictment charged Cline with driving under O.V.I. suspension, in violation of R.C. 4510.14(A), a first-degree misdemeanor.

{¶4} Cline initially pled not guilty to the charges in the indictment. Geauga County Public Defender Robert Umholtz was appointed to represent Cline.

{¶5} On July 31, 2006, a change of plea hearing was held. Cline withdrew his not guilty plea. He pled guilty to Counts 1, 2, 3, 5, and 6 of the indictment. Upon the state's recommendation, the trial court dismissed the remaining counts of the indictment.

{¶6} On August 3, 2006, Cline sent a hand-written letter to the trial court asking that a motion to withdraw his guilty plea be entered. The trial court forwarded a copy of this letter to Attorney Umholtz. No further action was taken by Attorney Umholtz, or Cline individually, to file a formal motion to withdraw Cline's guilty plea.

{¶7} A sentencing hearing was scheduled for September 6, 2006. On September 5, 2006, Cline filed a motion to continue the sentencing hearing for the purpose of obtaining a psychological assessment. The trial court denied this motion, and the sentencing hearing occurred as scheduled.

{¶8} At the sentencing hearing, the trial court asked Cline whether there was any reason that it should not proceed with sentencing. Cline responded that he did not believe the plea agreement was followed and that he believed he had not been adequately represented by counsel. The trial court did not address Cline's concerns on the record. After this discussion, Cline exercised his allocution rights and gave a statement in mitigation of sentence.

{¶9} The trial court sentenced Cline to ten-year prison terms for his convictions on Counts 1 and 2 of the indictment; an eight-year prison term for his conviction on Count 3 of the indictment; a five-year prison term for his conviction on Count 5 of the

indictment; and a five-year prison term for his conviction on Count 6 of the indictment. The trial court ordered that all of these prison sentences be served consecutively. Thus, Cline's aggregate prison sentence was 38 years.

{¶10} Cline timely appealed the trial court's judgment entry to this court. After receiving the record in this matter, we noticed the letter from Cline to the trial court was missing. Therefore, upon our request, the trial court supplemented the record with Cline's letter to the trial court and a copy of the cover letter the trial court sent to Attorney Umholtz.

{¶11} Cline raises two assignments of error. His first assignment of error is:

{¶12} "The trial court erred by failing to adhere to the mandates of Crim.R. 32(A)(1) and R.C. 2929.19(A)."

{¶13} Cline's argument combines the requirements of R.C. 2929.19(A) and Crim.R. 32(A)(1). While there are similarities between the statute and the criminal rule, we believe there are important distinctions that must be noted.

{¶14} Crim.R. 32 provides, in part:

{¶15} "Sentence shall be imposed without unnecessary delay. Pending sentence, the court may commit the defendant or continue or alter the bail. At the time of imposing sentence, the court shall do all of the following:

{¶16} "(1) Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment."

{¶17} R.C. 2929.19 provides, in pertinent part:

{¶18} "(A)(1) The court shall hold a sentencing hearing before imposing a sentence under this chapter upon an offender who was convicted of or pleaded guilty to a felony ***. At the hearing, the offender, the prosecuting attorney, the victim or the victim's representative, *** and, with the approval of the court, any other person may present information relevant to the imposition of sentence in the case. The court shall inform the offender of the verdict of the jury or finding of the court and *ask the offender whether the offender has anything to say as to why sentence should not be imposed upon the offender.*" (Emphasis added.)

{¶19} Thus, Crim.R. 32(A) provides the defendant an opportunity to address the court prior to sentencing to explain his version of the offense, offer evidence in mitigation of sentence, or express remorse.[1] R.C. 2929.19(A), however, appears to be more procedural in nature, in that it permits the defendant to inform the court of any reasons sentence should not be imposed. With this distinction in mind, we will address Cline's arguments.

{¶20} The Supreme Court of Ohio has held that "[t]rial courts must painstakingly adhere to Crim.R. 32, guaranteeing the right of allocution. A Crim.R. 32 inquiry is much more than an empty ritual: it represents a defendant's last opportunity to plead his case or express remorse."[2]

{¶21} Cline's allocution rights were not infringed in this matter. Cline was fully permitted to address the trial court regarding mitigation of his sentence. His statement comprised two full pages of the transcript. In his allocution statement, Cline expressed

1. *State v. Green* (2000), 90 Ohio St.3d 352, 359-360.
2. Id.

remorse, explained that he did not intend to hurt anyone, and said that if there was any way for him to change the outcome, he would.

{¶22} Next, we will address whether the trial court complied with R.C. 2929.19(A)(1). The following colloquy occurred at the sentencing hearing:

{¶23} "THE COURT: I will let you make a statement. I want to know if there is any reason that this sentencing should not proceed at this time?

{¶24} "MR. CLINE: I am not sure, your Honor. I am really not sure. ***

{¶25} "I entered into some things that I thought were agreements, and I'm not sure these agreements were followed.

{¶26} "There has [sic.] been changes made.

{¶27} "THE COURT: I am just talking about the procedural stance of this case, today, us going forward with the proceeding. I denied the motion to continue.

{¶28} "MR. CLINE: I understand that, your Honor.

{¶29} "THE COURT: Do you have any other reason that you object to the proceeding today?

{¶30} "MR. CLINE: Yeah. I feel as though I have been improperly represented in this, your Honor.

{¶31} "I do. I do. And I don't want to make a mockery of this, ***

{¶32} "And you know, people say that I have no remorse.

{¶33} "THE COURT: I don't want to get in to that part of it.

{¶34} "I recognize that your statement, that you feel you have been improperly represented.

{¶35} "MR. CLINE: I feel that I have not fully - -

{¶36} "THE COURT: Don't interrupt me. You can bring that up a later time.

{¶37} "I am going forward. If that's your only objection, I am going forward with the sentencing at this time."

{¶38} Cline was then given the opportunity to make his statement in mitigation of sentence. At the conclusion of Cline's allocution statement, the following colloquy occurred.

{¶39} "MR. CLINE: ***

{¶40} "That's all I have to say. [Public Defender Umholtz], I don't want to take it out on you personally, but I don't feel that you have represented me properly, and I put it in two letters to your Honor.

{¶41} "THE COURT: You can take that up with Mr. Umholtz at a later time.

{¶42} "Anything that you want to offer, Mr. Umholtz?"

{¶43} The trial court complied with R.C. 2929.19(A)(1) by asking Cline if there is any reason sentencing should not proceed. Cline raised an issue of whether the plea agreement was followed and indicated that he believed he was improperly represented by counsel. Cline argues the trial court had an additional duty to inquire following his responses to the court's question.

{¶44} Initially, we will address Cline's argument as it relates to the trial court's inaction regarding Cline's concern about the plea agreement being adhered to.

{¶45} The only concern Cline raised about the plea agreement is whether it was followed. The signed guilty plea agreement indicates there are no other terms to the agreement outside of what is contained in the plea agreement itself. Thus, there could only be limited reasons why the plea agreement was not adhered to. Since the written

guilty plea was in the record, the trial court could have easily determined that the terms of the guilty plea agreement were followed. This would explain the trial court's failure to further inquire about Cline's allegation that the terms of the plea agreement were not followed.

{¶46} We have independently reviewed the plea agreement and confirm that the plea agreement was precisely followed in this matter. The charges that the state agreed to recommend be dismissed in the plea agreement were dismissed by the trial court. Further, Cline was only convicted of the offenses that he specifically agreed to plead guilty to. Thus, any perceived error in the trial court's failure to inquire regarding Cline's assertion that the plea agreement was not followed is harmless beyond a reasonable doubt. See Crim.R. 52(A). An error is harmless if it is not prejudicial, i.e., if the results of the proceedings would not have been different without the error.[3] In this matter, the results of the proceedings would not have been different had the trial court inquired about the state's alleged noncompliance with the plea agreement, because the record clearly reveals that the plea agreement was strictly adhered to.

{¶47} The second issue raised by Cline at the sentencing hearing was the representation he received from trial counsel. As an initial matter, we note that Cline, in the present appeal, has not raised or asserted any claim of ineffective assistance of counsel.

{¶48} The Supreme Court of Ohio held that "when 'an indigent accused questions the effectiveness and adequacy of assigned counsel, *** it is the duty of the

3. (Citations omitted.) *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, at ¶7.

trial judge to inquire into the complaint and make such inquiry a part of the record.'"[4] The court further noted that "'inquiry may be brief and minimal, but it must be made.'"[5] In *Deal*, the defendant raised concerns about his counsel during the guilt phase of his trial.[6] In this matter, Cline raised his concern about counsel at his sentencing hearing. We note several courts have held that the *Deal* holding does not apply at sentencing hearings.[7] In explaining this distinction, the Second Appellate District held:

{¶49} "Unlike an expression of dissatisfaction concerning the performance of trial counsel uttered during the guilt phase of the trial, an expression of dissatisfaction following conviction on all counts is unremarkable. It is not uncommon for a criminal defendant, or any other litigant, for that matter, to feel, and to express, sentiments of dissatisfaction with trial counsel after an adverse verdict has been rendered. There is no relief that the trial court can afford the criminal defendant at that point other than a new trial, and the convicted criminal defendant may seek that relief through an appropriate motion, through an appeal, or through a petition for post-conviction relief, if the relief is warranted."[8]

{¶50} We acknowledge that, as a result of his guilty plea, Cline did not have a jury trial. However, the Second District's analysis can be applied to this matter. At a sentencing hearing, a defendant is faced with the finality of the proceedings and the reality that a prison term is imminent. Thus, he may employ "last-ditch" efforts in an

4. *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, at ¶138, quoting *State v. Deal* (1969), 17 Ohio St.2d 17, syllabus.
5. Id., quoting *State v. King* (1995), 104 Ohio App.3d 434, 437.
6. *State v. Deal*, 17 Ohio St.2d at 17-18.
7. See *State v. Harris*, 2d Dist. No. 19796, 2004-Ohio-3570, at ¶32-35, citing *State v. Bruton* (Nov. 4, 1981), 9th Dist. No. 10036, 1981 Ohio App. LEXIS 12414. See, also, *State v. Lawrence* (Sept. 28, 1993), 4th Dist. No. 93 CA 1940, 1993 Ohio App. LEXIS 5046, at *3-8.
8. *State v. Harris*, at ¶35.

attempt to avoid that outcome. If Cline believed Attorney Umholtz was not adequately representing him during the plea negotiations, he should have raised that concern at the appropriate time, i.e., at the change of plea hearing. At the change of plea hearing, Cline stated he agreed with the terms of the plea agreement, that he discussed the plea agreement with his attorney, that he understood and signed the written plea agreement, and that he understood the rights he was waiving by entering the guilty plea. In addition to dispelling Cline's assertion that the plea agreement was not adhered to, the fact that the plea agreement was reduced to writing negates any contention by Cline that the ultimate plea agreement was different than what he agreed to with his counsel. Also, at no time during the change of plea hearing did Cline express concern with the representation provided by Attorney Umholtz. Thus, based on the facts and circumstances of this case, we agree with the proposition that the trial court in this matter did not have a duty to conduct a *Deal* inquiry at the sentencing hearing.

{¶51} Moreover, we note the duty prescribed by *Deal* "arises only if the allegations are sufficiently specific; vague or general objections do not trigger the duty to investigate further."[9] In this matter, Cline only made general statements that he was not satisfied with Attorney Umholtz's representation. He did not allege a specific instance of deficient performance. For this additional reason, the trial court was not required to inquire regarding Cline's concern about his representation.

{¶52} We have held that the trial court did not have a *duty* to conduct a *Deal* inquiry following Cline's statement about his dissatisfaction with counsel. However, the better practice would have been for the trial court to conduct a minimal inquiry regarding

9. *State v. Carter* (1998), 128 Ohio App.3d 419, 423, citing *State v. Deal*, 17 Ohio St.2d at 19.

Cline's concerns. This practice would have permitted the trial court to quickly dispose of any nonmeritorious claims and would have resulted in a more complete record on appeal. However, under the specific facts and circumstances set forth herein, the trial court in this matter was not required to conduct such an inquiry.

{¶53} Finally, Cline does not argue how he was prejudiced by the trial court's actions. Specifically, on appeal, Cline does not raise ineffective assistance of trial counsel as an assigned error. In addition, we note that the only significant action trial counsel assisted Cline with was the guilty plea. On appeal, Cline does not assert an argument that his guilty plea was not entered knowingly, voluntarily, and intelligently.

{¶54} Cline's first assignment of error is without merit.

{¶55} Cline's second assignment of error is:

{¶56} "The trial court abused its discretion by denying appellant's motion to withdraw his guilty plea."

{¶57} "An application to the court for an order shall be by motion. A motion, other than one made during trial or hearing, shall be in writing unless the court permits it to be made orally."[10]

{¶58} Cline never filed a written motion to withdraw his guilty plea. However, in an August 2006 letter to the trial court, Cline requested that he be permitted to "withdraw his plea of guilty." Since Cline was represented by counsel, this letter was forwarded to Attorney Umholtz. The trial court acted correctly in forwarding the letter to Cline's appointed counsel and not further considering it. This is because once a defendant "accepts counsel's assistance and does not move the court to proceed pro

10. Crim.R. 47.

se, he may not 'act as co-counsel on his own behalf.'"[11] While Cline expressed dissatisfaction with his counsel in the letter, he did not seek to proceed pro se nor did he ask for substitute counsel. Further, Attorney Umholtz did not seek to withdraw as counsel.

{¶59} For reasons not contained in the record, a formal motion to withdraw the guilty plea was not filed. Possibly, after discussing the matter with Attorney Umholtz, Cline changed his mind regarding his desire to withdraw his guilty plea. This possibility is supported by the fact that Cline appeared at the sentencing hearing and raised concerns that the plea agreement was not being followed. Such actions suggest that Cline continued to ratify the plea agreement.

{¶60} In addition, at the sentencing hearing, Cline never formally made an oral motion to the court to withdraw his guilty plea. Nor do we consider the concerns raised by Cline regarding the state's alleged noncompliance with the plea agreement to be analogous to a request to withdraw his plea. The August 2006 letter indicates that Cline was personally familiar with the appropriate language to be used if he wished to withdraw his guilty plea, but he never suggested this at the sentencing hearing. As a result, the trial court cannot be faulted for failing to allow a motion that was never properly before it.

{¶61} Cline cites this court's opinion in *State v. Glavic* in support of his position.[12] The defendant in that case, at the sentencing hearing, asked "'[c]an I stop all

11. *State v. Greenleaf*, 11th Dist. No. 2005-P-0017, 2006-Ohio-4317, at ¶70, quoting *State v. Thompson* (1987), 37 Ohio St.3d 1, 6-7.
12. *State v. Glavic* (2001), 143 Ohio App.3d 583.

the many cards and withdraw my plea? Then while – I'll withdraw my plea."[13] The defendant directly moved the court to withdraw his guilty plea. In this matter, Cline did not ask the court to withdraw his plea. Cline argues that his statements to the court regarding his dissatisfaction with counsel and his belief that the plea agreement was not followed should be construed as a motion to withdraw his guilty plea. We disagree.

{¶62} There is nothing in the record to suggest that Cline sought to withdraw his guilty plea. Cline argues that, had the trial court engaged him in an inquiry, he would have been prompted to move the court to withdraw his plea. Cline's argument is pure speculation. As noted above, Cline was aware of the proper language to be used if he wished to withdraw his plea. However, he failed to use that language at the sentencing hearing.

{¶63} Further, if anything, Cline's statement regarding the plea agreement sought to *enforce* the agreement. He expressed concern that the agreement was not followed. He never indicated that he had changed his mind and no longer wished to plead guilty. Nor did he protest his innocence. To the contrary, his actions were focused on his belief that the state was deficient in meeting its obligations of the plea agreement.

{¶64} Since Cline failed to move the court to withdraw his guilty plea, the trial court did not err by failing to address the absent motion.

{¶65} Cline's second assignment of error is without merit.

{¶66} The judgment of the trial court is affirmed.

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13. Id. at 589.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.