[Cite as *State v. Mobley*, 2018-Ohio-3880.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 18AP-23
v.	:	(C.P.C. No. 16CR-2061)
Alphonso D. Mobley, Jr.,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 25, 2018

On brief: *Ron O'Brien*, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

On brief: *Alphonso D. Mobley, Jr.*, pro se.

APPEAL from the Franklin County Court of Common Pleas

SADLER, J.

{¶ 1} Defendant-appellant, Alphonso D. Mobley, Jr., appeals from a judgment of the Franklin County Court of Common Pleas denying his motion to withdraw his guilty plea. For the reasons that follow, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On April 15, 2016, a Franklin County Grand Jury indicted appellant on charges of aggravated arson, in violation of R.C. 2909.02, a felony of the first degree; criminal use of chemical, biological, radiological, or nuclear weapon or explosive, in violation of R.C. 2909.27, a felony of the second degree; criminal possession of chemical, biological, radiological, or nuclear weapon or explosive, in violation of R.C. 2909.26, a felony of the third degree; illegal assembly or possession of chemicals or substances for the

manufacture of a chemical weapon, biological weapon, radiological or nuclear weapon or explosive device, in violation of R.C. 2909.28, a felony of the fourth degree; and illegally manufacturing or possessing explosives, in violation of R.C. 2923.17, a felony of the second degree. A mandatory R.C. 2941.141 firearm specification attached to each of the above-referenced charges in the indictment. The indictment also contained an unspecified count for having weapons while under disability, in violation of R.C. 2923.13, a felony of the third degree.

{¶ 3} Appellant subsequently entered a plea agreement whereby he pleaded guilty to aggravated arson with a firearm specification and criminal use of an explosive device. The parties jointly recommended a prison term of 14 years. On application of the prosecutor, the trial court ordered a nolle prosequi as to the remaining counts in the indictment.

{¶ 4} On May 1, 2017, the trial court convicted appellant and sentenced him to ten years in prison for aggravated arson, plus a mandatory one-year prison term for the firearm specification and three years in prison for criminal use of an explosive device. The trial court ordered appellant to serve the prison terms for the two convictions consecutive to each other and consecutive to the firearm specification, for an aggregate prison term of 14 years. Appellant did not appeal the judgment of conviction and sentence.

{¶ 5} On October 25, 2017, appellant filed a motion to withdraw his guilty plea pursuant to Crim.R. 32.1. In his affidavit in support of the motion, appellant averred that his plea was "involuntary and unknowingly made," the prosecutor committed misconduct by "misrepresentations in presenting an illusory promise in an agreement that recommended an illegal sentence," and his trial counsel was "ineffective in not evaluating the application of the sentence." (Appellant's Aff. at ¶ 2-4, attached to Mot. to Withdraw Guilty Plea.) The substance of appellant's argument in support of his motion to withdraw his guilty plea is that the convictions of aggravated arson and criminal use of an explosive device were allied offenses of similar import and that R.C. 2941.25 required the trial court to merge the two counts for purposes of conviction and sentence.

{¶ 6} The trial court found that res judicata barred appellant from raising the merger argument underlying his motion to withdraw his guilty plea because that argument could have been raised in a direct appeal from the judgment of conviction and sentence. In

the alternative, the trial court determined that appellant did not allege facts in his motion which would support a finding of manifest injustice, prosecutorial misconduct, or ineffective assistance of trial counsel. Accordingly, the trial court denied the motion without an evidentiary hearing.

{¶ 7} Appellant timely appealed to this court from the judgment of the trial court.

II. ASSIGNMENTS OF ERROR

{¶ 8} Appellant assigns the following as trial court error:

> [1.] Trial court abused its discretion when it denied petitioner motion to withdraw on grounds was not allied offenses of similar import.
>
> [2.] Trial court abused its discretion when it denied petitioners [sic] motion of [sic] withdraw on grounds of res judicata.
>
> [3.] Trial court abused its discretion when it denied motion to withdraw without a hearing.
>
> [4.] Trial court abused its discretion when it denied motion to withdraw on grounds that counsel is not ineffective.
>
> [5.] Trial court abused its discretion when it denied motion to withdraw on grounds: no manifest injustice.

III. STANDARD OF REVIEW

{¶ 9} Pursuant to Crim.R. 32.1, "post-sentence motions to withdraw guilty pleas are subject to a manifest injustice standard." *State v. Muhumed*, 10th Dist. No. 11AP-1001, 2012-Ohio-6155, ¶ 8, citing *State v. Oluoch*, 10th Dist. No. 07AP-45, 2007-Ohio-5560, ¶ 9, citing *State v. Xie*, 62 Ohio St.3d 521, 526 (1992). "An appellate court will not reverse a trial court's denial of a motion to withdraw a plea absent an abuse of discretion." *Muhumed* at ¶ 8, citing *State v. Totten*, 10th Dist. No. 05AP-278, 2005-Ohio-6210, ¶ 5. Where, however, the issue is the applicability of res judicata, which is a question of law, an appellate court conducts a de novo review. *Muhumed* at ¶ 11.

IV. LEGAL ANALYSIS

A. Appellant's Second Assignment of Error

{¶ 10} Because we find that our resolution of appellant's second assignment of error impacts our ruling on each of appellant's other assignments of error, we will consider it

first. In appellant's second assignment of error, appellant contends the trial court abused its discretion when it denied appellant's motion to withdraw his guilty plea on grounds of res judicata. We disagree.

{¶ 11} Appellant's primary argument in support of his motion to withdraw his guilty plea is grounded on R.C. 2941.25, which applies to multiple count indictments and provides as follows:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶ 12} Appellant claims that the two counts in the indictment to which he pleaded guilty, aggravated arson and criminal use of an explosive device, are allied offenses of similar import and that R.C. 2941.25 required the trial court to merge the two counts for purposes of conviction and sentence. The trial court concluded that res judicata barred appellant's merger argument. We agree with the trial court.

{¶ 13} "Motions to withdraw guilty pleas are governed by Crim.R. 32.1, which provides that the motion 'may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.' " *State v. Spivakov*, 10th Dist. No. 13AP-32, 2013-Ohio-3343, ¶ 9, quoting Crim.R. 32.1. Manifest injustice relates to some fundamental flaw in the proceedings which results in a miscarriage of justice or is inconsistent with the demands of due process. *Id.* at ¶ 10, citing *State v. Williams*, 10th Dist. No. 03AP-1214, 2004-Ohio-6123, ¶ 5. " ' "[I]t is clear that under such standard, a postsentence withdrawal motion is allowable only in extraordinary cases." ' " *Spivakov* at ¶ 10, quoting *State v. Gripper*, 10th Dist. No. 10AP-1186, 2011-Ohio-3656, ¶ 7, quoting *State v. Smith*, 49 Ohio St.2d 261, 264 (1977).

{¶ 14} "Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel 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." (Emphasis omitted.) *State v. Perry*, 10 Ohio St.2d 175 (1967), paragraph nine of the syllabus. " ' "[R]es judicata promotes the principles of finality and judicial economy by preventing endless relitigation of an issue on which a defendant has already received a full and fair opportunity to be heard." ' " *State v. Walden*, 3d Dist. No. 4-15-13, 2016-Ohio-258, ¶ 19, quoting *State v. Schwieterman*, 3d Dist. No. 10-09-12, 2010-Ohio-102, ¶ 23, quoting *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, ¶ 18. Consistent with these principles, this court has repeatedly held that res judicata bars a party from raising issues in a postsentencing Crim.R. 32.1 motion that were or could have been raised in a direct appeal. *State v. Ikharo*, 10th Dist. No. 10AP-967, 2011-Ohio-2746, ¶ 11; *State v. Hagler*, 10th Dist. No. 10AP-291, 2010-Ohio-6123; *State v. Conteh*, 10th Dist. No. 09AP-490, 2009-Ohio-6780; *State v. Hazel*, 10th Dist. No. 08AP-1002, 2009-Ohio-2144.

{¶ 15} When we apply the reasoning of the Supreme Court of Ohio in *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, to the facts of this case, we conclude that appellant could have raised in a direct appeal from his conviction and sentence the very same merger argument he now makes in support of his motion to withdraw his guilty plea. In *Underwood*, a grand jury indicted Underwood on two counts of aggravated theft and two counts of theft. Underwood agreed to plead no contest to all four counts in exchange for receiving a prison term of no more than two years. In its written sentencing recommendation, the state noted that the two counts in each of the different categories of thefts would be considered allied offenses of similar import. However, at sentencing, no discussion was held regarding allied offenses, and the trial court convicted Underwood of all four counts and imposed a two-year prison sentence for each conviction. The trial court ordered all the sentences to be served concurrently for a total prison term of two years. *Id.* at ¶ 2-6.

{¶ 16} Underwood appealed, arguing the trial court committed plain error by convicting him of allied offenses of similar import and imposing multiple sentences. The

Second District Court of Appeals agreed with Underwood and reversed the conviction. The state then appealed the decision to the Supreme Court on the following issue: "Is an agreed and jointly recommended sentence 'authorized by law' under R.C. 2953.08(D)(1), and thus not reviewable, when the agreed sentence includes convictions for offenses that are allied offenses of similar import?" *Id*. at ¶ 9. The Supreme Court answered the question in the negative and affirmed the decision of the Second District. *Id*. at ¶ 33.

{¶ 17} In so ruling, the Supreme Court stated:

> [A] trial court is prohibited from imposing individual sentences for counts that constitute allied offenses of similar import. A defendant's plea to multiple counts does not affect the court's duty to merge those allied counts at sentencing. This duty is mandatory, not discretionary. Therefore, we conclude that when a sentence is imposed on multiple counts that are allied offenses of similar import in violation of R.C. 2941.25(A), R.C. 2953.08(D) does not bar appellate review of that sentence even though it was jointly recommended by the parties and imposed by the court.

Id. at ¶ 26.

{¶ 18} The *Underwood* court explained that R.C. 2941.25, in essence, codifies the double jeopardy protections of the Fifth Amendment to the United States Constitution and, thus, must be considered as an exception to R.C. 2953.08(D)(1).[1] *Id*. at ¶ 23-26.

{¶ 19} Pursuant to the decision of the Supreme Court in *Underwood*, there can be no doubt that appellant could have raised the merger argument he advanced in his Crim.R. 32.1 motion in a direct appeal from the judgment of conviction and sentence. This is true even though the merger issue was not raised at sentencing. *Id*. Consequently, res judicata barred appellant from raising the merger argument in his subsequent Crim.R. 32.1 motion to withdraw his guilty plea. *Id*. *See also State v. Jefferson*, 2d Dist. No. 26022, 2014-Ohio-2555, ¶ 8 (because the failure to merge allied offenses does not render a judgment void, but voidable, a Crim.R. 32.1 challenge to the trial court's failure to merge allied offenses is barred by the doctrine of res judicata); *State v. Askew*, 5th Dist. No. 2015CA00034, 2015-Ohio-4125, ¶ 16 (res judicata barred appellant's Crim.R. 32.1 motion based on his claim that

[1] R.C. 2953.08(D)(1) provides that "[a] sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge."

trial counsel was ineffective for failing to raise a merger argument at sentencing). *See also Walden* at ¶ 20.

{¶ 20} For the foregoing reasons, we hold the trial court did not err when it concluded that res judicata barred appellant's merger argument in support of his Crim.R. 32.1 motion to withdraw his guilty plea. Accordingly, appellant's second assignment of error is overruled.

B. Appellant's First and Fifth Assignments of Error

{¶ 21} In appellant's first and fifth assignments of error, appellant makes the same merger argument we addressed in connection with appellant's second assignment of error. In each of these assignments of error, appellant claims that manifest injustice occurred when he was convicted of aggravated arson and criminal use of an explosive device because those two counts in the indictment are allied offenses of similar import.

{¶ 22} As we determined in connection with appellant's second assignment of error, res judicata barred appellant from raising the merger argument in support of his motion to withdraw his guilty plea because appellant could have raised that argument in a direct appeal from the judgment of conviction and sentence. Moreover, even if res judicata did not bar appellant from raising a merger argument in support of his Crim.R. 32.1 motion to withdraw his guilty plea, "[a] defendant seeking to withdraw a post-sentence guilty plea bears the burden of establishing a manifest injustice based on specific facts either contained in the record or supplied through affidavits attached to the motion." *State v. Barrett*, 10th Dist. No. 11AP-375, 2011-Ohio-4986, ¶ 8.

{¶ 23} *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, sets forth the standard to apply to merger determinations under R.C. 2941.25:

> As a practical matter, when determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must ask three questions *when defendant's conduct supports multiple offenses*: (1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions. *The conduct, the animus, and the import must all be considered*.

(Emphasis added.) *Id.* at ¶ 31.

{¶ 24} Here, appellant's affidavit attached as an exhibit to his motion to withdraw his guilty plea does not provide any information regarding the conduct underlying the convictions. Appellant did not file a copy of the transcript of the plea hearing or the sentencing hearing with his motion. Additionally, we note that the only relevant factual information that may be gleaned from the indictment is that appellant committed the two offenses at issue on the same date. The trial court concluded that "Defendant's crimes (F1 Aggravated arson with firearm specification, and F2 Criminal Use of an Explosive Device) are not allied offenses of similar import." (Dec. 15, 2017 Entry at 3.) The trial judge who issued the judgment of conviction and sentence in this case is the same trial judge who denied appellant's motion to withdraw his guilty plea.

{¶ 25} On this record, we have no basis on which to question the trial court's determination that the count in the indictment charging appellant with aggravated arson did not merge with the count charging appellant with criminal use of an explosive device for purposes of conviction and sentence. Accordingly, appellant's first and fifth assignments of error are overruled.

C. Appellant's Fourth Assignment of Error

{¶ 26} In his fourth assignment of error, appellant argues that his trial counsel provided ineffective assistance by failing to make the merger argument at sentencing. We disagree.

{¶ 27} In the *Askew* case, the Fifth District Court of Appeals held that res judicata barred appellant's Crim.R. 32.1 motion alleging ineffective assistance of trial counsel because appellant could have raised his argument in a direct appeal from his conviction and sentence. In *Askew*, as in this case, appellant pleaded guilty to multiple counts in the indictment. The trial court convicted appellant of each of the counts to which he pleaded guilty and imposed multiple prison terms. Appellant did not appeal from his conviction and sentence but later filed a motion to withdraw his plea pursuant to Crim.R. 32.1. As is the case herein, appellant in *Askew* claimed that his trial counsel provided ineffective assistance by failing to argue at the sentencing hearing that R.C. 2941.25 precluded a conviction of multiple counts. The Fifth District held that res judicata barred appellant's ineffective assistance claim. *Id.* at ¶ 16.

{¶ 28} We agree with the reasoning employed by the Fifth District. Accordingly, we hold the trial court did not err when it determined that res judicata barred appellant from raising his claim of ineffective assistance of trial counsel in support of his motion to withdraw his guilty plea. Moreover, the trial court found that appellant's claim of ineffective assistance of trial counsel was "wholly unsupported by the record, and * * * entirely meritless." (Dec. 15, 2017 Entry at 3.) As noted in connection with appellant's first and fifth assignments of error, appellant failed to file the transcript of his plea hearing or his sentencing hearing. Consequently, even if res judicata did not bar appellant from raising ineffective assistance of counsel as a basis to withdraw his guilty plea, there is insufficient evidence in the record for this court to determine the merits of appellant's claim.

{¶ 29} For the foregoing reasons, appellant's fourth assignment of error is overruled.

D. Appellant's Third Assignment of Error

{¶ 30} In his third assignment of error, appellant argues the trial court abused its discretion when it denied his motion to withdraw his guilty plea without first conducting an evidentiary hearing. We disagree.

{¶ 31} A trial court is not automatically required to hold a hearing on a postsentence motion to withdraw a guilty plea. *Barrett at* ¶ 9. A hearing must only be held if the facts alleged by the defendant, accepted as true, would require that the defendant be allowed to withdraw the plea. *Id*. As previously noted, appellant's affidavit in support of his motion did not contain information regarding the conduct underlying the offenses to which he pleaded guilty. Thus, the facts alleged by the appellant, if accepted as true, would not support his merger argument. Moreover, the record evidences the fact that res judicata barred appellant from raising a merger argument in his Crim.R. 32.1 motion. Consequently, even if appellant had alleged sufficient facts to support a merger argument, the trial court did not abuse its discretion by denying the motion without a hearing. *Walden* at ¶ 20-21 (because appellant "could have raised his claims relating to R.C. 2941.25 and Crim.R. 11 on direct appeal[,] * * * we cannot say that the trial court abused its discretion in denying [appellant's] post-sentence motion to withdraw his guilty plea without a hearing").

{¶ 32} For the foregoing reasons, appellant's third assignment of error is overruled.

V. CONCLUSION

{¶ 33} Having overruled appellant's five assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and HORTON, JJ., concur.
