

[Cite as *State v. Drake*, 2017-Ohio-7328.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105908

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

HOWARD L. DRAKE

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-606259-A

BEFORE: Stewart, J., Kilbane, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: August 24, 2017

FOR APPELLANT

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MELODY J. STEWART, J.:

{¶1} Defendant-appellant Howard L. Drake received a seven-year sentence after pleading guilty to a single count of felonious assault. He filed a notice of appeal (*State v. Drake*, 8th Dist. Cuyahoga No. 105176, 2017-Ohio-4190), and while that appeal was pending, filed a Crim.R. 32.1 postsentence motion to withdraw his guilty plea. The court denied the motion on grounds that it lacked jurisdiction to proceed because of the pending appeal. The sole assignment of error contests that ruling. The state, citing R.C. 2953.21(D), concedes that the court erred by concluding that it could not reach the merits of Drake’s motion to withdraw the guilty plea.

{¶2} When a notice of appeal is filed, the trial court loses jurisdiction except to take action in aid of the appeal. *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St.2d 94, 97, 378 N.E.2d 162 (1978). The trial court retains jurisdiction over issues “not inconsistent with the appellate court’s jurisdiction to reverse, modify, or affirm the judgment from which an appeal is taken” — what is characterized as acts “not in conflict” with appellate jurisdiction. *Yee v. Erie Cty. Sheriff’s Dept.*, 51 Ohio St.3d 43, 44, 553 N.E.2d 1354 (1990).

{¶3} An exception to the rule set forth in *Special Prosecutors* exists for collateral attacks to a judgment of conviction. R.C. 2953.21(D) states: “the court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending.” However, “R.C. 2953.21 and 2953.23 do not govern a

Crim.R. 32.1 postsentence motion to withdraw a guilty plea.” *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522, syllabus. This is because “a postsentence Crim.R. 32.1 motion is not collateral but is filed in the underlying criminal case and that it targets the withdrawal of a plea, it is not a ‘collateral challenge to the validity of a conviction or sentence.’” *Id.* at ¶ 13, quoting *State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (1999). Drake plainly styled his motion as a motion to withdraw a guilty plea under Crim.R. 32.1, so we do not accept the state’s concession of error under R.C. 2953.21(D). Nevertheless, we agree that the court erred by denying the motion to withdraw the guilty plea.

{¶4} The court correctly understood that any ruling it made on the motion to withdraw the guilty plea would interfere with our jurisdiction to hear the merits of the pending direct appeal from that same guilty plea. For that reason, the court lacked jurisdiction to rule on the motion to withdraw the guilty plea. *See State v. Moon*, 8th Dist. Cuyahoga No. 101930, 2015-Ohio-1648, ¶ 7. So, lacking jurisdiction to rule on the pending motion to withdraw the guilty plea, the court could not deny the motion. The court should have held the motion in abeyance until Drake’s direct appeal was decided, at which time it could proceed to rule on the motion. *See State v. Lauharn*, 2d Dist. Miami No. 2011 CA 10, 2012-Ohio-1572, ¶ 13 (court’s ruling on motion to withdraw guilty plea while a direct appeal was pending was a “nullity” and motion remained pending after direct appeal had been decided). Now that Drake’s direct appeal has been resolved, *see*

Drake, 8th Dist. Cuyahoga No. 105176, 2017-Ohio-4190,¹ the trial court now has jurisdiction and can proceed to rule on the motion. We sustain the assignment of error.

{¶5} Judgment reversed and remanded to the trial court for further proceedings consistent with this opinion.

It is ordered that appellant recover of appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

MARY EILEEN KILBANE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR

¹Appointed appellate counsel filed a motion to withdraw as counsel pursuant to Loc.R. 16(C) of the Eighth District Court of Appeals and *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), on grounds that he could find no nonfrivolous issues to raise on appeal. Drake did not file a pro se brief. We granted appellate counsel's motion to withdraw and dismissed the appeal as frivolous. *Drake, id.*