

[Cite as *State v. Perry*, 2018-Ohio-4117.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106723

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAVEION PERRY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-610816-A

BEFORE: Keough, J., Boyle, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: October 11, 2018

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FOR APPELLANT

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KATHLEEN ANN KEOUGH, J.:

{¶1} Defendant-appellant, Daveion Perry, appeals from the trial court’s judgment denying his postconviction motion to withdraw his guilty plea. Finding no merit to the appeal, we affirm.

I. Background

{¶2} Perry pleaded guilty to and was convicted of aggravated murder, five counts of aggravated robbery, four counts of kidnapping, two counts of felonious assault, breaking and entering, obstructing official business, and tampering with evidence. He was sentenced to life in prison without parole. In *State v. Perry*, 8th Dist. Cuyahoga No. 105307, 2017-Ohio-7324, this court’s decision dismissing Perry’s direct appeal, this court set forth the procedural history and facts relating to Perry’s guilty pleas and sentence as follows:

On October 21, 2016, Perry was charged in a 15-count indictment resulting from the death of a 15-year-old boy working at a fast-food restaurant in Cleveland Heights, Ohio. The state of Ohio reserved the right to seek the death penalty with the indictment. The incident, which occurred on October 14, 2016, was captured on the restaurant’s video surveillance system.

The state met with Perry while he was in the custody of the Cleveland Heights Police Department. Perry had retained counsel at the time. The state and Perry, through retained counsel, reached an agreement where the state would “take death off the table for a full, complete confession and acceptance of responsibility [by Perry].” One of the stipulations of the agreements provide[d] that in order to obtain the benefit of the no death penalty indictment, Perry would knowingly, voluntarily, and in compliance with Crim.R. 11 enter a guilty plea to the indictment in full as charged. The state reserved the right, both on the indictment and in the plea contract,

to proceed with a reindictment for the death penalty if Perry chose not to fulfill his part of the agreement.

Perry was then arraigned on October 26, 2016. Immediately following the arraignment, the trial court held the guilty plea hearing. At the hearing, Perry and the state acknowledged on the record that they entered into a plea contract and explained the terms of the agreement on the record. Both parties stipulated to a case book of evidence and stipulated that the victim's family consented to the plea agreement. In exchange for Perry's guilty plea, the state agreed to not seek the death penalty. The state reserved the right to reindict with the capital specification and use Perry's confession if he changed his mind and chose to plead not guilty. After properly discussing the rights afforded to Perry under Crim.R. 11, the trial court accepted Perry's guilty plea.

The matter proceeded to sentencing on October 28, 2016. The court reviewed all of the evidence provided to it. The court found that Perry was fully and continuously represented by counsel, he was informed of his *Miranda* rights, and he knowingly and voluntarily entered into the plea contract. The state presented a power point presentation for the court's consideration, including statements from the victim's family, Perry's criminal history, Perry's written confession, and the basis for the guilty plea. Perry made a statement on his behalf and apologized to the victim's family as well as his family. The trial court sentenced Perry to an aggregate sentence of life in prison without parole to be served consecutive to six years in prison on the firearm specifications.

Id. at ¶ 2-5.

{¶3} In December 2016, Perry, pro se, sought leave to file a delayed appeal and sought appointment of counsel. This court granted both motions and appointed counsel for Perry. Perry's counsel subsequently filed a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 492 (1967), asserting that no prejudicial error had occurred below and any grounds for appeal would be frivolous. *Id.* at ¶ 6.

{¶4} Perry also filed a pro se brief supporting his direct appeal in which he argued that his plea was void because (1) the Cleveland Heights Municipal Court lacked jurisdiction to accept his guilty plea; (2) his due process rights were violated when he entered into a plea agreement for offenses with which he had not yet been charged; (3) the state breached the agreement when he was forced to plead guilty to additional charges in the indictment that were not contained in the plea agreement; and (4) the trial court did not comply with Crim.R. 11(C) in accepting his guilty plea.

{¶5} In dismissing Perry's appeal, this court found there was no merit to any of Perry's arguments, or to any potential issues raised by Perry's counsel for our *Anders* review. This court stated:

[W]e find that there is no meritorious issue to argue. Appellate counsel submitted a brief in support that outlined the details of Perry's plea agreement, the trial court's compliance with Crim.R. 11 during the plea colloquy, the effective assistance Perry received from trial counsel, and the fact that the court imposed an agreed sentence that cannot be appealed pursuant to R.C. 2953.08(D)(1). This court's own independent review indicates that the plea contract with the state provided for Perry to plead guilty in compliance with Crim.R. 11. After a thorough plea colloquy from the trial court, Perry pled guilty. Our review further indicates that trial counsel was effective and the trial court imposed an agreed prison sentence, which included a sentence of life in prison without parole from which Perry cannot appeal.

In his pro se brief, Perry challenges his plea and argues the Cleveland Heights Municipal Court lacked jurisdiction to accept his guilty plea. As discussed above, our independent review of the record reveals that Perry stated at the plea hearing that he understood the rights he was waiving by pleading guilty and that he understood the effect of his plea. Our further review of the record reveals that Perry's guilty plea was properly entered into in the Cuyahoga County Common Pleas Court on October 26, 2016, not the Cleveland Heights Municipal Court.

Perry, 8th Dist. Cuyahoga No. 105307, 2017-Ohio-7324, at ¶ 11-12.

{¶6} This court concluded that because there was no meritorious argument regarding Perry’s guilty plea and sentence, an appeal would be “wholly frivolous.” Accordingly, the court granted counsel’s request to withdraw and dismissed the appeal. *Id.* at ¶ 13.

{¶7} Perry subsequently filed a motion to withdraw his plea, which the trial court denied on res judicata grounds. Perry now appeals from the trial court’s denial of his motion.

II. Law and Analysis

{¶8} Perry argues on appeal that the trial court erred in denying his motion to withdraw his guilty plea because (1) the trial court lacked jurisdiction to accept his plea; (2) the trial court did not comply with Crim.R. 11 in accepting his plea; (3) his due process rights were violated when he was compelled to enter into a plea agreement for offenses with which he had not yet been charged; and (4) the state breached the agreement when he was compelled to plead guilty to additional counts not contained in the written agreement.

{¶9} 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 claimed lack of due process that was raised or could have been raised by the defendant at the trial that resulted in the judgment of conviction, or on

an appeal from that judgment. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus.

{¶10} In short, res judicata bars the further litigation of issues that were or could have been raised previously in a direct appeal. *State v. Leek*, 8th Dist. Cuyahoga No. 74338, 2000 Ohio App. LEXIS 2909 (June 21, 2000), citing *Perry* at *id.* The doctrine “promotes the principles of finality and judicial economy by preventing endless litigation of an issue on which the defendant has already received a full and fair opportunity to be heard.” *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 18.

{¶11} All of the arguments that Perry raised in his motion to withdraw his plea were raised, considered, and rejected in Perry’s direct appeal. The doctrine of res judicata therefore bars any further consideration of these issues. Accordingly, the trial court did not err in denying Perry’s motion to withdraw his guilty plea.

{¶12} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

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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.

KATHLEEN ANN KEOUGH, JUDGE _____

MARY J. BOYLE, P.J., and
SEAN C. GALLAGHER, J., CONCUR