[Cite as *State v. Johnson*, 2019-Ohio-2332.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO, :

Plaintiff-Appellee, :

No. 107617

v. :

WILLIAM JOHNSON, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 13, 2019

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case Nos. CR-07-503651-A and CR-07-504657-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Anthony Thomas Miranda, Assistant Prosecuting Attorney, *for appellee*.

Robert A. Dixon, *for appellant*.

MARY J. BOYLE, P.J.:

{¶ 1} Defendant-appellant, William Johnson, appeals the trial court's judgment denying his motion to withdraw his plea that he entered into in February 2008. He raises two assignments of error for our review:

> 1. The lower court erred and denied the appellant due process and protection of Ohio law which bars his state convictions based upon his conviction for the same conduct in federal court.
>
> 2. The appellant received ineffective assistance of counsel.

{¶ 2} Finding no merit to his arguments, we affirm.

I. Procedural History and Factual Background

{¶ 3} Johnson was indicted on state charges in two cases in November and December 2007, including charges of drug trafficking, resisting arrest, possessing criminal tools, and two counts of drug possession. The alleged date of the offenses in the first indictment was September 29, 2007, and October 6, 2007, in the second indictment.

{¶ 4} Johnson pleaded guilty on February 28, 2008, to four of the five charges. In the first case, he pleaded guilty to drug trafficking (crack cocaine) in violation of R.C. 2925.03(A)(2), a third-degree felony; resisting arrest in violation of R.C. 2921.33, a second-degree misdemeanor; and possessing criminal tools in violation of R.C. 2923.24(A), a fifth-degree felony. In the second case, he pleaded guilty to possessing drugs (cocaine) in violation of R.C. 2925.11(A), a fifth-degree felony.

{¶ 5} Approximately one month later, Johnson and 15 other individuals were indicted in federal court on 23 charges. Count 1 of the federal indictment charged Johnson with conspiracy to possess with the intent to distribute cocaine and crack cocaine in violation of 21 U.S.C. 841(a)(1) and 846 from July 2005 through March 2008. The indictment listed Johnson's "overt acts" in the conspiracy as occurring on April 20, June 28, July 11, and October 16, 2007.

{¶ 6} In August 2008, Johnson pleaded guilty to the federal indictment. The United States District Court for the Northern District of Ohio sentenced Johnson on October 16, 2008, to 57 months in prison.

{¶ 7} On November 6, 2008, the state court sentenced Johnson to a total of three years in prison and ordered that Johnson serve his sentence concurrent to the sentenced imposed in his federal case.

{¶ 8} Almost ten years later, in April 2018, Johnson filed an "emergency motion" to withdraw his guilty pleas for his drug trafficking and drug possession in both of his 2008 state-court cases pursuant to Crim.R. 32.1.[1] He alleged that his 2008 state-court convictions were barred by R.C. 2925.50 due to the fact that he was convicted of drug charges based upon the same conduct in federal court. According to Johnson, he pleaded guilty in February 2018, to a new charge of being "a felon in possession" in federal court. At the time he filed his Crim.R. 32.1 motion in state court, he was awaiting sentencing in the new federal case (which was scheduled for

[1] He did not challenge his convictions for possessing criminal tools or resisting arrest.

June 5, 2018). Johnson asserted that if his 2008 state convictions were vacated, "it would have a significant impact on his criminal history category and guideline calculation for his federal sentencing on June 5, 2018."[2]

{¶ 9} The state opposed Johnson's motion. The trial court held a hearing on Johnson's motion and subsequently denied it. The trial court found that R.C. 2925.50 did not bar Johnson's prosecution in state court. Regarding Johnson's state-court drug possession charge, the trial court found that it was not barred from prosecution because it did not have the same elements as Johnson's federal charge of conspiracy to possess with the intent to distribute cocaine. With respect to Johnson's state-court trafficking conviction, the trial court found that the date of the state trafficking offense was not included as one of the overt acts listed in the federal conspiracy indictment. It is from this judgment that Johnson now appeals.

II. Crim.R. 32.1

{¶ 10} Crim.R. 32.1 provides, "A motion to withdraw a plea of guilty or no contest 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." This rule imposes a strict standard for deciding a postsentence motion to withdraw a plea. *State v. Griffin*, 141 Ohio App.3d 551, 553, 752 N.E.2d 310 (7th Dist.2001). A defendant may only be allowed to withdraw a plea after sentencing in "extraordinary cases." *State v. Smith*,

[2] Johnson asserted at the hearing on his motion that without the two state-court convictions, his sentence on the new charge in federal court "goes from 77 and 96 months * * * down to 51 to 63 months," and "from 77 and 96 months down to 63 and 78 months."

49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1977). The defendant bears the burden of showing a manifest injustice warranting the withdrawal of a plea. *Id*. at paragraph one of the syllabus. "The logic behind this precept is to discourage a defendant from pleading guilty to test the weight of potential reprisal, and later withdrawing the plea if the sentence was unexpectedly severe." *State v. Wynn*, 131 Ohio App.3d 725, 728, 723 N.E.2d 627 (8th Dist.1998), citing *State v. Caraballo*, 17 Ohio St.3d 66, 477 N.E.2d 627 (1985).

{¶ 11} At the outset, we note that Johnson is attempting to vacate guilty pleas that he entered into almost ten years prior to filing his motion. This court has stated that Crim.R. 32.1 does not contain a time limit for filing a post-sentence motion to withdraw a plea, but "an undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of a motion under Crim.R. 32.1 is a factor adversely affecting the credibility of the movant and militating against the granting of the motion." *Richmond Hts. v. McEllen*, 8th Dist. Cuyahoga No. 99281, 2013-Ohio-3151, ¶ 12, citing *Smith*.

{¶ 12} We review a trial court's decision to grant or deny a post-sentence motion to withdraw a guilty plea pursuant to Crim.R. 32.1 for abuse of discretion. *State v. Wilkey*, 5th Dist. Muskingum No. CT2005-0050, 2006-Ohio-3276, ¶ 21. The term "abuse of discretion" is one of art, connoting judgment exercised by a court that neither comports with reason, nor the record. *State v. Ferranto*, 112 Ohio St. 667, 676-678, 148 N.E. 362 (1925). An abuse of discretion may be found when the trial court "applies the wrong legal standard, misapplies the correct legal standard,

or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, 892 N.E.2d 454, ¶ 15 (8th Dist.).

III. Statutes at Issue

{¶ 13} Johnson contends that the trial court abused its discretion in denying his postsentence motion to withdraw his 2008 drug-related guilty pleas due to the fact that he was also convicted in 2008 of federal charges under 21 U.S.C. 841(a)(1) and 846 based upon the "same act."

{¶ 14} Ordinarily, under the Double Jeopardy Clause, a person cannot be prosecuted twice for the same offense. *See* the Fifth Amendment to the U.S. Constitution ("nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb"). But the United States Supreme Court has long held that two prosecutions brought by different sovereigns do not violate double jeopardy. *Puerto Rico v. Sanchez Valle*, 579 U.S. __, 136 S.Ct. 1863, 1871, 195 L.Ed.2d 179 (2016), citing *United States v. Lanza*, 260 U. S. 377, 382, 43 S. Ct. 141, 67 L.Ed. 314 (1922). According to United States Supreme Court precedence, states are separate sovereigns from the federal government, having their "authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment." *United States v. Gamble*, 694 Fed.Appx. 750, 751 (11th Cir.2017), citing *Sanchez Valle*.[3]

{¶ 15} This court has also stated:

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[3] The United States Supreme Court granted certiorari on this issue. *Gamble v. United States*, __ U.S. __, 138 S.Ct. 2707, 201 L.Ed.2d 1095 (June 28, 2018). It heard oral arguments on the case on December 6, 2018.

> The law in this area is well settled. The courts have consistently held that the Fifth Amendment prohibition against double jeopardy is not violated where the separate sovereigns (the state and the United States) prosecute and convict a single individual under their respective statutes for the same wrongful conduct. *See Abbate v. United States* (1959), 359 U.S. 187; *Bartkas v. People of the State of Illinois* (1959), 359 U.S. 121; 18 A.L.R. Fed. 393.

State v. Mosely, 8th Dist. Cuyahoga No. 51415, 1987 Ohio App. LEXIS 5538, 2 (Jan. 15, 1987).

{¶ 16} In Ohio, however, the General Assembly enacted R.C. 2925.50 to prohibit dual-sovereign prosecutions under certain circumstances. This statute provides:

> If a violation of this chapter is a violation of the federal drug abuse control laws, as defined in section 3719.01 of the Revised Code, a conviction or acquittal under the federal drug abuse control laws for the same act is a bar to prosecution in this state.

{¶ 17} In state court, Johnson was convicted of trafficking cocaine under R.C. 2925.03(A)(2), which provides:

> No person shall knowingly * * * [p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled substance or a controlled substance analog is intended for sale or resale by the offender or another person.

{¶ 18} Johnson was also convicted in state court of possession of cocaine under R.C. 2925.11(A), which states that "[n]o person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog."

{¶ 19} In federal court, Johnson was convicted of "conspiracy to possess with intent to distribute" cocaine and crack cocaine between July 2005, through

March 2008, under 21 U.S.C. 841(a)(1) and 846. It is undisputed that these offenses were under the ambit of "federal drug abuse control laws." The first of these, 21 U.S.C. 841(a)(1), provides in relevant part:

> [I]t shall be unlawful for any person knowingly or intentionally * * * to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]

{¶ 20} The conspiracy section, 21 U.S.C. 846, provides:

> Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

IV. Res Judicata

{¶ 21} Johnson did not file a direct appeal of his state-court convictions. "It is well recognized that the doctrine of res judicata bars claims that were raised or could have been raised on direct appeal." *State v. Fountain*, 8th Dist. Cuyahoga Nos. 92772 and 92874, 2010-Ohio-1202, ¶ 9, citing *State v. Davis*, 119 Ohio St.3d 422, 2008-Ohio-4608, 894 N.E.2d 1221. We must therefore determine if Johnson's arguments are barred by res judicata.

{¶ 22} Johnson argues that res judicata only applies to collateral attacks through a petition for postconviction relief and not Crim.R. 32.1 motions. This court, however, has consistently recognized that the doctrine of res judicata bars all claims raised in a Crim.R. 32.1 motion that were raised or could have been raised in a prior proceeding, including a direct appeal. *See State v. Gaston*, 8th Dist. Cuyahoga No. 82628, 2003-Ohio-5825, ¶ 8, quoting *State v. Szefcyk*, 77 Ohio St.3d 93, 671 N.E.2d 233 (1996) ("Res judicata applies to 'any proceeding' initiated after a

final judgment of conviction and direct appeal. * * * Therefore, * * * a Crim.R. 32.1 motion would be included within 'any proceeding,' and as such, 'res judicata bars any part of the motion that could have been raised on direct appeal.'"); *see also Fountain* at ¶ 9, citing *State v. McGee*, 8th Dist. Cuyahoga No. 91638, 2009-Ohio-3374; *State v. Pickens*, 8th Dist. Cuyahoga No. 91924, 2009-Ohio-1791; *State v. Coats*, 3d Dist. Mercer Nos. 10-09-04 and 10-09-05, 2009-Ohio-3534, and *Gaston*.

{¶ 23} In this case, Johnson could have raised the issues that he raised in his Crim.R. 32.1 motion in a direct appeal. But the issue of whether res judicata applies in this case comes down to the question of whether Johnson's state-court convictions are void under R.C. 2925.50. Res judicata does not apply to challenges to void judgments, which can be challenged at any time. *State v. Bennett*, 4th Dist. Scioto No. 15CA3682, 2015-Ohio-3832, ¶ 11, citing *State v. Mitchell*, 187 Ohio App.3d 315, 2010-Ohio-1766, 931 N.E.2d 1157 (6th Dist.).

{¶ 24} In general, a void judgment is one that has been imposed by a court that lacks subject matter jurisdiction over the case or the authority to act. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 27. In contrast, "a voidable judgment is one rendered by a court that has both jurisdiction and authority to act, but the court's judgment is invalid, irregular, or erroneous." *State v. Bozek*, 11th Dist. Portage No. 2015-P-0018, 2016-Ohio-1305, ¶ 20, citing *State v. Britta*, 11th Dist. Lake No. 2011-L-041, 2011-Ohio-6096, ¶ 14. Challenges to voidable judgments are barred by res judicata if not raised on direct appeal. *State v.*

Parson, 2d Dist. Montgomery No. 24641, 2012-Ohio-730, ¶ 10, citing *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568.

{¶ 25} R.C. 2931.03 grants common pleas courts general original subject matter jurisdiction over the prosecution of "all crimes and offenses," excluding "minor offenses" that are vested in inferior courts. *State ex rel. Pruitt v. Donnelly*, 129 Ohio St.3d 498, 2011-Ohio-4203, 954 N.E.2d 117, ¶ 2. R.C. 2925.50 states that "a conviction or acquittal under the federal drug abuse control laws for the same act is a bar to prosecution in this state." The question then becomes, does the language "bar to prosecution" in R.C. 2925.50 remove the trial court's subject matter jurisdiction over Johnson's state-court convictions?

{¶ 26} To answer this question, the state points to a "useful analogy," which it asserts is statutes of limitations. R.C. 2901.13(A)(1) states that "[e]xcept [for certain offenses], a prosecution shall be barred unless it is commenced within the following periods[.]" The statute then lists the time limitations for felonies and misdemeanors. Although the statute states that "prosecution shall be barred" if it is not brought with the time limitations for an offense, "the expiration of a statute of limitations is not a jurisdictional defect." *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d 70, 76, 701 N.E.2d 1002 (1998). Therefore, if a defendant does not move to dismiss a charge prior to trial, the defendant waives the statute-of-limitations defense. *Daniel v. State*, 98 Ohio St.3d 467, 2003-Ohio-1916, 786 N.E.2d 891, ¶ 7.

{¶ 27} We agree with the state that R.C. 2950.25 is analogous to R.C. 2901.13(A)(1). Thus, R.C. 2950.25 is not a jurisdictional defect, and any judgment

violating R.C. 2950.25 would be voidable and not void. Therefore, because Johnson did not file a direct appeal raising the issue that his convictions were barred by R.C. 2950.25, his arguments are now barred by res judicata.

{¶ 28} Johnson's first assignment of error is overruled.

V. Ineffective Assistance of Counsel

{¶ 29} In his second assignment of error, Johnson argues that his counsel was ineffective for failing to raise R.C. 2925.50 to the trial court "at sentencing." Therefore, Johnson appears to assert that his counsel should have filed a presentence motion to withdraw his plea.

{¶ 30} We first note that Johnson is appealing from a 2018 judgment denying his motion to withdraw his plea. In this assigned error, he is raising an issue that took place before and during his 2008 sentencing hearing. Johnson is therefore using a Crim.R. 32.1 postsentence motion to withdraw his guilty pleas as a substitute for appeal. *See Shaker Hts. v. Jackson*, 8th Dist. Cuyahoga No. 86161, 2006-Ohio-707, ¶ 10; *State v. McGuire*, 8th Dist. Cuyahoga No. 86608, 2006-Ohio-1330, ¶ 15.

{¶ 31} Thus, res judicata again bars his argument.

> Under the doctrine of res judicata, "[a] point or a fact which was actually and directly in issue in a former action and was there passed upon and determined by a court of competent jurisdiction may not be drawn in question in any future action between the same parties or their privies, whether the cause of action in the two actions be identical or different."

State v. Ulery, 2d Dist. Clark No. 2010 CA 89, 2011-Ohio-4549, ¶ 10, quoting *Norwood v. McDonald*, 142 Ohio St. 299, 52 N.E.2d 67 (1943). Applied in the

current context, Johnson could have raised the issue of ineffective assistance of counsel in his direct appeal or in a timely petition for postconviction relief. Because he did not, his argument is now barred by res judicata.

{¶ 32} We further note that Johnson is raising an ineffective assistance of counsel claim within a Crim.R. 32.1 motion to vacate a guilty plea. With respect to an ineffective assistance of counsel claim regarding a guilty plea, "'the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty.'" *State v. Xie*, 62 Ohio St.3d 521, 524, 584 N.E.2d 715 (1992), quoting *Hill v. Lockhart*, 474 U.S. 52, 106 St.Ct. 366, 88 L.Ed.2d 203 (1985). In this case, Johnson entered into his guilty plea *before* he was ever charged in the federal case. Thus, his counsel could not have been deficient when Johnson entered into his plea.

{¶ 33} Johnson's second assignment of error is overruled.

{¶ 34} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue 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.

_____
MARY J. BOYLE, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
MICHELLE J. SHEEHAN, J., CONCUR