

[Cite as *State v. Perry*, 2019-Ohio-547.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107596

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: S. Gallagher, P.J., E.A. Gallagher, J., and Headen, J.

RELEASED AND JOURNALIZED: February 14, 2019

FOR APPELLANT

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ATTORNEYS FOR APPELLEE

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SEAN C. GALLAGHER, P.J.:

{¶1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. Appellant Daveion Perry appeals the decision of the trial court that denied his motion to vacate pleas. Upon review, we affirm the trial court's denial of the motion. We caution appellant that his conduct through the continued filing of appeals and original actions may result in his being declared a vexatious litigator pursuant to Loc.App.R. 23(A).

{¶2} On October 21, 2016, appellant was charged under a 15-count indictment with aggravated murder and other felony offenses that arose from an incident that resulted in the death of a 15-year-old boy working at a fast-food restaurant. Pursuant to a plea agreement, in exchange for appellant's guilty pleas to the charges, the state agreed to not seek the death penalty.

The trial court accepted appellant's guilty pleas and sentenced him to an aggregate term of life

in prison without parole to be served consecutive to six years in prison on the firearm specifications.

{¶3} In December 2016, appellant was granted leave to file a delayed appeal and was appointed counsel. His appointed counsel filed a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Appellant filed a pro se brief in support of his direct appeal in which he challenged his guilty pleas, the plea agreement, and the court's jurisdiction to accept his guilty pleas. This court granted the appointed counsel's motion to withdraw and dismissed the appeal upon finding "no meritorious argument exists and that the appeal would be wholly frivolous." *State v. Perry*, 8th Dist. Cuyahoga No. 105307, 2017-Ohio-7324, ¶ 13.

{¶4} While the direct appeal was pending, appellant, pro se, filed a petition for postconviction relief seeking to vacate or set aside the judgment of conviction or sentence. Appellant raised a number of constitutional claims and included an assertion of ineffective assistance of counsel. After this court reversed the trial court's initial ruling that it lacked jurisdiction to rule on the petition, the trial court issued a ruling that denied postconviction relief on December 15, 2017. The trial court found in part:

This defendant was offered and provided every constitutional guarantee that can be afforded to an accused. During every part of the proceedings from investigation, interrogation, plea and sentencing, the defendant was fully and ably represented. This Court afforded the defendant every opportunity to understand and employ his constitutional rights. Even one of the most highly respected appellate attorney[s] filed an "Anders" brief and acknowledged that there was nothing wrong with any of the proceedings and there was no issue for meritorious appeal.

* * *

Defendant has failed to present any substantive argument or proof as required by Rule 35 or the Rules of Criminal Procedure and/or R.C. §2953.21 for post-conviction relief. The defendant's motion is denied.

{¶5} On November 9, 2017, appellant, pro se, filed a postsentence motion to withdraw his pleas pursuant to Crim.R. 32.1.¹ On December 26, 2017, the trial court denied the motion “for all the reasons stated in the court’s ruling on defendant’s motion for post-conviction relief[.]” On appeal from that ruling, this court found all of the issues raised in appellant’s motion to withdraw were barred by the doctrine of res judicata. *State v. Perry*, 8th Dist. Cuyahoga No. 106723, 2018-Ohio-4117, ¶ 11.

{¶6} On August 10, 2018, appellant, pro se, filed a motion to vacate pleas, arguing that he did not receive effective assistance of counsel and raising several claims similar to those previously raised. On August 14, 2018, the trial court denied the motion, ruling as follows:

Defendant’s motion to vacate plea is denied. As with the defendant’s prior motions[,] there is no basis for this request. Defendant was ably and fully represented almost from the moment of his arrest. The murder of the victim is captured on film and there is no defense to the crime. When defendant asked to file an appeal, one of the most highly accomplished appellate lawyers in the state filed an Anders brief explaining there was no basis for an appeal and there were no errors made by the trial court. The appeal was dismissed. Defendant attached the detailed plea agreement to his motion to vacate and the plea

¹ Appellant filed an earlier motion to withdraw his pleas during the pendency of the direct appeal. That motion was denied. Appellant again filed a motion to withdraw after the postconviction matter had been remanded to the trial court.

agreement removed the death penalty in return for a plea to the crimes and an agreed life sentence without parole. The motion is denied.

{¶7} Appellant now appeals the trial court’s denial of his motion to vacate pleas. His sole assignment of error claims he was deprived of the effective assistance of counsel. Not only are the arguments raised under his assignment of error barred by res judicata, but also, appellant’s motion to vacate was not properly before the trial court.

{¶8} It is well settled that “[a] trial court lacks jurisdiction to consider a defendant’s motion to vacate his guilty pleas under Crim.R. 32.1 after a court of appeals has reviewed and affirmed the defendant’s convictions.” *State v. Parker*, 8th Dist. Cuyahoga No. 106062, 2018-Ohio-1847, ¶ 7, citing *State ex rel. Special Prosecutors v. Judges, Belmont Cty. Court of Common Pleas*, 55 Ohio St.2d 94, 97-98, 378 N.E.2d 162 (1978); see also *State v. Enyart*, 10th Dist. Franklin No. 17AP-507, 2018-Ohio-1071, ¶ 13-16.² The Supreme Court of Ohio has further held that “[r]es judicata bars the assertion of claims against a valid, final judgment of conviction that have been raised or could have been raised on appeal.” *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶ 59, citing *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus.

{¶9} Not only is a postsentence motion to withdraw a guilty plea under Crim.R. 32.1 subject to res judicata, but also, the doctrine of res judicata applies to successive postsentence motions to withdraw a plea. *State v. Brown*, 8th Dist. Cuyahoga No. 84322, 2004-Ohio-6421, ¶

² We note that the Supreme Court of Ohio has clarified that “the holding in *Special Prosecutors* does not bar the trial court’s jurisdiction over post-trial motions permitted by the Ohio Rules of Criminal Procedure” and that “a trial court retains jurisdiction to decide a motion for a new trial based on newly discovered evidence when the specific issue has not been decided upon direct appeal.” *State v. Davis*, 131 Ohio St.3d 1, 2011-Ohio-5028, 959 N.E.2d 516, ¶ 37. The instant case does not involve a motion for new trial, and appellant’s motion to vacate his pleas is not based on newly discovered evidence.

7, citing *Cleveland v. Dailey*, 8th Dist. Cuyahoga No. 84123, 2004-Ohio-5391, ¶ 7. “Thus, a Crim.R. 32.1 motion to withdraw a guilty plea should be denied when it asserts grounds for relief that were or should have been asserted in a previous motion.” *State v. Davis*, 8th Dist. Cuyahoga No. 105920, 2017-Ohio-8740, ¶ 6.

{¶10} Here, appellant’s motion to vacate his pleas was filed following the dismissal of his direct appeal and after the denial of his prior postsentence motion to withdraw his pleas pursuant to Crim.R. 32.1. In his motion to vacate his pleas, appellant asserts claims that were or could have been raised on direct appeal and in his previous motion. Thus, even if appellant’s motion had been properly before the court, appellant’s arguments would fail because of the doctrine of res judicata.

{¶11} For the foregoing reasons, we hold the trial court did not err when it denied appellant’s motion to vacate his pleas, albeit for different reasons than those cited by the trial court. Appellant’s sole assignment of error is overruled.

{¶12} Finally, we are providing a warning to appellant of this court’s inherent power to prevent abuse of the appellate process and we caution appellant on the potential impact of his repeated attempts to raise arguments that have been rejected by this court. Loc.App.R. 23 permits this court to sua sponte find a party to be a vexatious litigator “[i]f a party habitually, persistently, and without reasonable cause engages in frivolous conduct[,]” which is defined to include an appeal or original action that “is not reasonably grounded in fact or warranted by existing law.” Thus, appellant is forewarned that the continued filing of appeals or original actions, that are not reasonably grounded in fact or warranted by existing law, shall result in the declaration of his being a vexatious litigator pursuant to Loc.App.R. 23(B). *See State v. Williams*, 8th Dist. Cuyahoga No. 106254, 2018-Ohio-852, ¶ 13-15 (similar warning issued); *see*

also State v. Jordan, 8th Dist. Cuyahoga No. 100686, 2014-Ohio-2408, ¶ 7, fn. 1 (relitigation of issues through postconviction motions can warrant a determination that a defendant is a vexatious litigator).³

{¶13} Judgment affirmed.

It is ordered that appellee recover of appellant 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

SEAN C. GALLAGHER, PRESIDING JUDGE

EILEEN A. GALLAGHER, J., and
RAYMOND C. HEADEN, J., CONCUR

³ We note that since this appeal was taken, appellant filed yet another postsentence motion to vacate his conviction that has been denied by the trial court.