

[Cite as *State v. Grant*, 2019-Ohio-796.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107499

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL GRANT

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; VACATED IN PART;
REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-572242-A

BEFORE: E.A. Gallagher, P.J., Kilbane, A.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: March 7, 2019

APPELLANT

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ATTORNEYS FOR APPELLEE

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EILEEN A. GALLAGHER, P.J.:

{¶1} Defendant-appellant Michael Grant, pro se, appeals the trial court's denial of his motion to withdraw his guilty pleas under Crim.R. 32.1. Finding no merit to his appeal, we affirm the trial court's denial of his motion to withdraw his guilty pleas. However, because the trial court imposed the wrong sentences on Counts 9 and 10 and the sentences as imposed do not comply with R.C. 2971.03, we vacate the sentences imposed on Counts 9 and 10 and remand the matter for resentencing as to those counts only.

Procedural and Factual Background

{¶2} In September 2013, Grant pled guilty to a series of offenses involving three victims that occurred in January 2013 — two counts of rape with three-year firearm specifications and sexually violent predator specifications (amended Counts 1 and 10), two counts of rape with three-year firearm specifications (amended Counts 2 and 9), two counts of rape with no

specifications (amended Counts 3 and 11) and one count of aggravated robbery with a three-year firearm specification (amended Count 18). The trial court sentenced Grant to an aggregate prison term of 58 years to life — 13 years to life on Count 1, to be served consecutively to 12 years on Count 2, a concurrent term of 9 years on Count 3, a consecutive term of 13 years to life on Count 9, a consecutive term of 12 years on Count 10, a concurrent term of 9 years on Count 11 and a consecutive 8-year term on Count 18. The trial court also imposed five years of mandatory postrelease control, ordered him to pay costs and classified him as a Tier III sex offender.

{¶3} Grant appealed. Grant claimed that the trial court erred by imposing consecutive sentences without making the findings required by R.C. 2929.14 and H.B. 86 and by ordering him, in its sentencing journal entry, to pay costs that were not imposed in open court. On appeal, this court affirmed Grant’s convictions, concluding that “the record clearly and convincingly establishes that the trial court made all of the findings required under R.C. 2929.14(C)(4).” It reversed the trial court’s judgment as to the imposition of costs only and remanded the case for the limited purpose of allowing Grant an opportunity to move for waiver of court costs. *State v. Grant*, 8th Dist. Cuyahoga No. 100497, 2014-Ohio-2656 (“*Grant I*”). On remand, the trial court waived all court costs.

{¶4} In May 2015, Grant filed, pro se, a petition for postconviction relief. He claimed that the detective did not advise him of his *Miranda* rights when interrogating him and obtained a search warrant based solely on the information Grant gave him during the interrogation. The trial court denied the motion. Grant did not appeal the denial of his motion.

{¶5} In March 2017, Grant filed, pro se, a “motion for affidavit of fact writ of discovery.”

The trial court denied the motion and Grant appealed, pro se. The appeal was dismissed for failure to file a praecipe in accordance with Loc.App.R. 9(B).

{¶6} In October 2017, Grant filed, pro se, a motion to withdraw his guilty pleas. Grant claimed that he did not fully understand the nature of the charges against him, “wasn’t in [the] right state of mind” and was not advised that he was waiving certain constitutional rights by pleading guilty. In support of his motion, he attached a supplemental police report that detailed the results of several photo arrays. The trial court denied the motion and Grant appealed, pro se.

Once again, the appeal was dismissed for failure to file a praecipe in accordance with Loc.App.R. 9(B).

{¶7} In June 2018, Grant filed, pro se, a second motion to withdraw his guilty pleas pursuant to Civ.R. 32.1 — the motion that is the subject of this appeal. Grant claimed that he was denied effective assistance of counsel during plea negotiations because his counsel failed to advise him that (1) the firearm specifications in Counts 1, 2, 3, 9, 10 and 18 “would mandatorily run consecutive to each other and to all sentences for all other counts” and (2) that upon his release from prison, he would not be permitted to live within 1,000 feet of a school, preschool or child daycare center. He contends that had he been advised of these facts, he would not have pled guilty and would have gone to trial. In support of his motion, he attached an affidavit attesting to these facts.

{¶8} The trial court denied the motion. Grant appealed, raising two assignments of error for review:

Assignment of Error I:

The court should have considered the appellant's motion to withdraw guilty plea as a pre-sentence motion due to the judgment being void.

Assignment of Error II:

The trial court abused its discretion when it denied appellant's motion to withdraw guilty plea.

Law and Analysis

{¶9} The withdrawal of a guilty plea is governed by Crim.R. 32.1, which states:

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.

{¶10} In his first assignment of error, Grant asserts that the trial court's judgment of conviction is void because the trial court failed to make the necessary findings to support its imposition of consecutive sentences. He, therefore, contends that his motion to withdraw his guilty pleas should have been treated as if it were a presentence motion to withdraw guilty pleas, which is to be "freely and liberally granted," *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992), rather than a postsentence motion.

{¶11} In *Grant I*, however, this court held that the trial court made all of the necessary findings to impose consecutive sentences. 2014-Ohio-2656, ¶ 12. The court's decision in *Grant I* remains the law of the case here. *See, e.g., State v. King*, 8th Dist. Cuyahoga No. 97683, 2012-Ohio-4398, ¶ 16 ("The law of the case doctrine provides that the decision of a reviewing court in a case remains the law of the case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels."), citing *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984). Accordingly, Grant's first assignment of error is overruled.

{¶12} In his second assignment of error, Grant contends that counsel's performance was deficient and that his guilty pleas were not knowing, intelligent and voluntary because his trial counsel failed to advise him that (1) "the sentences to be imposed" upon his guilty pleas "would mandate consecutive sentences to all of the offenses, and to all of the specifications" and (2) he would not be able to reside within 1,000 feet of a school, preschool or child daycare center upon release from prison. He requests that we reverse the trial court and remand for a hearing on the motion.

{¶13} We review a trial court's decision to deny a defendant's postsentence motion to withdraw a guilty plea under an abuse of discretion standard. *See, e.g., State v. Vinson*, 2016-Ohio-7604, 73 N.E.3d 1025, ¶ 42 (8th Dist.), citing *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph two of the syllabus. A trial court's decision whether to hold a hearing on the motion is also reviewed for abuse of discretion.

{¶14} We find no abuse of discretion here because a trial court has no jurisdiction to consider a defendant's motion to withdraw his or her guilty pleas under Crim.R. 32.1 after a court of appeals has affirmed the defendant's convictions. *See State ex rel. Special Prosecutors v. Judges, Belmont Cty. Court of Common Pleas Judges*, 55 Ohio St.2d 94, 97-98, 378 N.E.2d 162 (1978). In *Special Prosecutors*, the Ohio Supreme Court held:

Crim.R.32.1 does not vest jurisdiction in the trial court to maintain and determine a motion to withdraw the guilty plea subsequent to an appeal and an affirmance by the appellate court. While Crim.R. 32.1 apparently enlarges the power of the trial court over its judgments without respect to the running of the court term, it does not confer upon the trial court the power to vacate a judgment which has been affirmed by the appellate court, for this action would affect the decision of the reviewing court, which is not within the power of the trial court to do.

Id. at 97-98; *see also State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶ 61-62 (trial court lacked jurisdiction to consider motion to withdraw guilty plea where

convictions were affirmed but case was remanded for limited purposes of resentencing on noncapital offenses); *State v. Parker*, 8th Dist. Cuyahoga No. 106062, 2018-Ohio-1847, ¶ 7.

{¶15} In this case, Grant appealed the trial court’s judgment to this court, and this court affirmed his convictions, which were based on his guilty pleas. *Grant I*, 2014-Ohio-2656. The trial court, therefore, did not have jurisdiction to consider Grant’s motion to withdraw his guilty pleas under Crim.R. 32.1. Accordingly, Grant’s second assignment of error is overruled.

{¶16} However, following our review of the record, we note, sua sponte, that the trial court appears to have transposed Counts 9 and 10 when sentencing Grant. With respect to Count 9, Grant entered a guilty plea to rape in violation of R.C. 2907.02(A)(1) with a three-year firearm specification. With respect to Count 10, he pled guilty to rape in violation of R.C. 2907.02(A)(1) with a three-year firearm specification and a sexually violent predator specification. The trial court sentenced Grant on Count 9 to “3 years on the firearm specification to be served prior to and consecutive to 10 years to life on the base charge per the SVP [sexually violent predator] specification for a total of 13 years to life in prison.” The trial court sentenced Grant on Count 10 to “3 years on the firearm specification to be served prior to and consecutive to 9 years on the base charge for a total of 12 years in prison.” Although a defendant pleads guilty to, and is sentenced for specific crimes not counts, and although it appears from the record that the trial court simply transposed Counts 9 and 10 when sentencing Grant, we do not believe this sentencing error is one that may be corrected through a nunc pro tunc judgment entry because such entries are limited to reflecting what the court actually decided and “‘cannot be used to reflect what the court might or should have decided, or intended to decide.’” *State v. Thomas*, 8th Dist. Cuyahoga No. 104174, 2017-Ohio-957, ¶ 20, quoting *State v. Carter*, 8th Dist. Cuyahoga No. 101810, 2015-Ohio-1834, ¶ 40. Because the trial court

imposed the wrong sentences on the wrong counts and the sentences as imposed do not comply with R.C. 2971.03, the sentences on Counts 9 and 10 are void. Accordingly, we must vacate the sentences imposed on Counts 9 and 10 and remand the matter for resentencing as to those counts only.

{¶17} Judgment affirmed in part; vacated in part; remanded.

It is ordered that appellant and appellee share the costs herein taxed.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas 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.

EILEEN A. GALLAGHER, PRESIDING JUDGE

MARY EILEEN KILBANE, A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR