**[Cite as *State v. Wheeler*, 2010-Ohio-2559.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|---|---|---|
| State of Ohio, | : | |
| Plaintiff-Appellee, | : | No. 09AP-910<br>(C.P.C. No. 03CR-01-403) |
| v. | : | No. 09AP-911<br>(C.P.C. No. 03CR-02-1023) |
| Kennedy Wheeler, | : | (REGULAR CALENDAR) |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on June 8, 2010

*Ron O'Brien,* Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

*Kennedy Wheeler*, pro se.

APPEALS from the Franklin County Court of Common Pleas.

FRENCH, J.

**{¶1}** Defendant-appellant, Kennedy Wheeler ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which denied his motions for return of property. Because we conclude that the doctrine of res judicata bars appellant's claims, we affirm.

**{¶2}** In January and February 2003, the Franklin County Grand Jury issued indictments against appellant, charging him with burglary (one count), aggravated burglary (two counts), rape (seven counts), aggravated robbery (two counts), kidnapping (two counts), gross sexual imposition (one count), theft (one count), receiving stolen property (three counts), and having a weapon under disability (two counts). In July 2003, appellant pleaded guilty to aggravated burglary (two counts), burglary (one count), rape (two counts), and receiving stolen property (one count). Appellant appealed his convictions, and this court affirmed. *State v. Wheeler*, 10th Dist. No. 03AP-832, 2004-Ohio-4891.

**{¶3}** On March 31, 2004, appellant filed a petition to vacate or set aside sentence. In it, appellant alleged that he had received ineffective assistance of counsel, in part because his counsel had not required the prosecutor to state on the record that he had agreed "to return property and funds" to appellant. He stated that return of his property was part of the plea agreement, which the state had violated. Attached to the petition is a September 1, 2003 letter from Attorney Kerry M. Donahue, advising appellant that he had "been actively pursuing getting your property and vehicle to your mother."

**{¶4}** Plaintiff-appellee, the state of Ohio ("the state"), moved to dismiss appellant's petition. The state argued that appellant had presented no evidence that return of his property was part of the plea agreement. The state also presented an October 16, 2003 entry signed by the trial judge, Franklin County Prosecutor Ron O'Brien, and Attorney Donahue. The entry states that a motor vehicle registered to

appellant had been seized at the time of his arrest. The entry allowed appellant's mother or Attorney Donahue to retrieve the title to the vehicle and ordered the vehicle to be returned to appellant or his mother.

**{¶5}** On August 2, 2004, appellant filed a motion for return of property. In it, he asked the court to direct the Franklin County Sheriff's Department to return $1,986.50 seized at the time of his arrest. Attached to his motion is page five of an Evidence Collection document, which lists several property items, cash, and coins identified as evidence. Handwritten notations indicate that marked cash and coins add up to a total value of $1,986.50.

**{¶6}** On September 23, 2004, appellant moved to withdraw his guilty plea. Appellant argued, in part, that the state had violated its agreement to return appellant's car, money, and property. Appellant alleged that the state had failed to file a forfeiture petition in compliance with R.C. 2933.43 and, as a result, that his due process rights had been violated.

**{¶7}** On October 8, 2004, the trial court issued a decision and entry, which denied appellant's petition to vacate or set aside sentence. The court held, in part, that appellant had failed to present evidence that the plea agreement was conditioned on the return of appellant's car, property or money. The court also noted the October 16, 2003 entry, which ordered the return of appellant's car.

**{¶8}** On November 26, 2004, appellant moved for summary judgment granting release of $1,986.50 to him. Appellant reiterated that the state had failed to follow proper forfeiture procedures to retain the money. The state did not oppose the motion.

**{¶9}** On October 19, 2005, the trial court ordered the Columbus Police Department to return $1,986.50 to appellant. Neither the state nor appellant appealed that order.

**{¶10}** On January 20, 2006, appellant moved to enforce the court's October 19, 2005 judgment. Appellant indicated that the Columbus Police Department had not yet returned his money to him.

**{¶11}** On October 13, 2006, the trial court denied appellant's motion to withdraw his guilty plea. The court did not address the issue of appellant's property.

**{¶12}** On December 20, 2006, appellant filed a motion for return of property. In it, he asked the court to order the Columbus Police Department to return or pay him the value of property seized at the time of his arrest. Attached to his motion are the following: (1) a list of 47 items with assigned values that total $15,344.50; (2) an Evidence Collection document, which contains eight pages of items identified as evidence; and (3) the September 1, 2003 letter from Attorney Donahue.

**{¶13}** On January 2, 2007, the state responded to appellant's motion. The response states: "The State defers to the Court's judgment in the determination of this matter."

**{¶14}** On January 24, 2007, the state filed a second response to appellant's motion. In it, the state "asserts that it is not in possession of any property requested by" appellant. The state asked the court to deny appellant's motion.

**{¶15}** On July 1, 2008, appellant filed a motion for summary judgment releasing appellant's property or ordering the payment of $15,344.50 to appellant. Appellant

argued that the state had failed to follow procedures for forfeiture and, by doing so, violated his due process rights.

**{¶16}** On August 24, 2009, the trial court denied appellant's motion for summary judgment. The court stated that "the State of Ohio [cannot] return what it does not have." The court also concluded that it did not have jurisdiction to issue an order to the Columbus Police Department because the department was not a party to the criminal case.

**{¶17}** Appellant filed a timely appeal. He raises the following assignments of error:

> 1. Trial Court Err[ed] In Denying Jurisdiction.
>
> 2. Trial Court Err[ed] In Denying Appellant Summary [Judgment].
>
> 3. Appellant['s] Constitutional Due Process Right Was Violated.

**{¶18}** As an initial matter, the state contends that the doctrine of res judicata bars appellant's claims. We agree.

**{¶19}** In general terms, the doctrine of res judicata bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding, except an appeal from a judgment of conviction, any defense or any claimed due process violation the defendant raised or could have raised at trial or on appeal. *State v. Szefcyk*, 77 Ohio St.3d 93, 96, 1996-Ohio-337, reaffirming *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus.

**{¶20}** More specifically, this court has held that the doctrine of res judicata bars a convicted defendant from raising on appeal the denial of a motion for return of property. *State v. Loch*, 10th Dist. No. 06AP-1142, 2007-Ohio-4449. In *Loch*, the defendant claimed that the state had not followed the forfeiture procedures prescribed by R.C. 2923.32 and had failed to return his property to him. This court stated that the defendant had filed a direct appeal and two post-conviction petitions, none of which had raised the property issue. Instead, the defendant filed a motion for return of property four years after his sentencing and three years after his convictions and sentence had been upheld on appeal. We concluded that the doctrine of res judicata precluded the defendant from raising these additional issues, "which should have been raised in those prior proceedings, particularly when the subject of this appeal does not involve any new evidence, nor any evidence that is outside of the record." Id. at ¶15.

**{¶21}** The facts of the case before us are even more compelling than those at issue in *Loch*. Here, appellant not only raised the issue—that is, whether his property had been returned to him—in numerous filings, he was successful in obtaining the return of his car and $1,986.50. His 2004 motion for return of his money even included one page of the eight pages on which he based his 2006-2007 motions. As to both of his earlier motions, appellant got precisely what he requested—his car and his money. He could have requested the return of additional property at that time or he could have appealed the court's orders. He did neither, and he may not do so now.

**{¶22}** Appellant also had the opportunity to appeal his conviction, the denial of his motion to vacate, and the denial of his motion to withdraw his guilty plea. To the

extent he did appeal, this court affirmed the trial court's judgment in every instance. Thus, the doctrine of res judicata bars appellant from re-litigating those judgments.

**{¶23}** For all these reasons, we overrule appellant's second and third assignments of error. By doing so, we render appellant's first assignment of error moot. We decline, then, to consider whether the trial court properly determined that it did not have jurisdiction to order the Columbus Police Department to return appellant's property. We also decline to consider whether appellant could bring a civil action to recover his property.

**{¶24}** We affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

TYACK, P.J., and BROWN, J., concur.