

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-L-067
SCOTT L. LINTZ,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 07 CR 000726.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Joshua S. Horacek*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Scott L. Lintz, pro se, PID: A552-005, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030-8000 (Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} Appellant, Scott L. Lintz, appeals from the June 10, 2010 judgments of the Lake County Court of Common Pleas, denying his oral motion to vacate his conviction, and including a mandatory postrelease control sanction.

{¶2} On February 15, 2008, appellant was indicted on eight counts: counts one and two, felonious assault, felonies of the second degree, in violation of R.C. 2903.11(A)(1); counts three and four, felonious assault, felonies of the second degree,

in violation of R.C. 2903.11(A)(2); counts five and six, aggravated assault, felonies of the fourth degree, in violation of R.C. 2903.12(A)(1); and counts seven and eight, aggravated assault, felonies of the fourth degree, in violation of R.C. 2903.12(A)(2). Appellant filed a waiver of his right to be present at the arraignment. The trial court entered a not guilty plea on his behalf.

{¶3} Thereafter, appellant withdrew his not guilty plea and entered an oral and written plea of guilty to a lesser included offense of count one, attempted felonious assault, a felony of the third degree, in violation of R.C. 2923.02 and R.C. 2903.11(A)(1), and a lesser included offense of count two, attempted felonious assault, a felony of the third degree, in violation of R.C. 2923.02 and R.C. 2903.11(A)(1). The remaining counts were dismissed. The trial court accepted appellant's guilty plea, referred the matter to the Adult Probation Department for a presentence investigation and report, a victim impact statement, and a psychological evaluation, and deferred sentencing.

{¶4} The trial court sentenced appellant to three years in prison on count one and four years in prison on count two, to run consecutive to each other for a total of seven years. The trial court's sentencing entry incorrectly stated that postrelease control is optional up to a maximum of three years.

{¶5} Appellant did not appeal the foregoing judgment.

{¶6} Appellant later filed numerous pro se pleadings. Five months into his sentence, appellant filed a petition for postconviction relief based on R.C. 2953.21. The state filed a response. On February 4, 2009, the trial court denied appellant's petition

without a hearing. Appellant appealed that ruling. This court dismissed appellant's appeal as being untimely. *State v. Lintz*, 11th Dist. No. 2009-L-099, 2009-Ohio-5899.

{¶7} One day after the trial court denied appellant's motion for postconviction relief, appellant filed a "Motion for an Order to Stay Proceedings and Compelling Trial Counsel to Turn Over Documents Needed as Evidence Relevant (sic) to his Post Conviction Proceedings." The state filed a response explaining that the presentence report that appellant sought from his trial counsel was in the possession of the Lake County Adult Probation Department. The trial court denied appellant's motion.

{¶8} Thereafter, appellant filed an opposition to the state's response to his petition for postconviction relief and a motion for judgment on the pleadings.

{¶9} After those pleadings were filed and considered, the trial court was not persuaded to change its earlier decision denying appellant's petition for postconviction relief. The trial court concluded that appellant's arguments and requests were barred by the doctrine of res judicata. Also, the trial court held that appellant failed to demonstrate a clear, constitutional violation that he was deprived of his right to effective assistance of counsel.

{¶10} Appellant did not appeal the foregoing judgment.

{¶11} Slightly less than two weeks later, appellant filed a pro se motion for findings of fact and conclusions of law pursuant to Crim.R. 12(F), which was denied. The trial court determined that its February 4, 2009 judgment set forth in detail the court's analysis and reasons for denying appellant's petition for postconviction relief.

{¶12} Appellant appealed from the judgment overruling his motion for findings of fact and conclusions of law, Case No. 2009-L-048. However, after the case was briefed

by both parties, appellant filed a voluntary motion to dismiss his appeal, which was granted by this court.

{¶13} While that appeal was pending, appellant continued to file pro se pleadings in the trial court, including a motion for “New and Inclusive Evidence Pursuant Civil Rule Civil 60(B)(5), Fraud Upon the Court[,]” and a motion captioned “Defendant’s New and Inclusive Evidence Pursuant Ohio Criminal Rules of Procedure, Rule 35[,]” which were denied.

{¶14} Appellant also filed a motion to withdraw his guilty plea and the state filed a response. The trial court denied appellant’s motion. Appellant’s motion for reconsideration was also denied.

{¶15} Approximately three months later, appellant filed a motion captioned “Defendant’s Omnibus Motion ‘Evidentiary Hearing Requested[,]”” which included a motion to vacate a void judgment; a motion to withdraw his guilty plea; a motion to dismiss; a motion for production of grand jury transcripts to support his motion to dismiss based on prosecutorial misconduct before the grand jury; a motion for appointment of counsel; a motion to be conveyed to court; and a request for an evidentiary hearing. The state filed a response and appellant filed a reply. On April 23, 2010, the trial court determined that appellant’s issues were without merit, except for the fact that the July 17, 2008 sentencing entry failed to state the correct postrelease control sanction. Specifically, the trial court stated in its entry:

{¶16} “[Appellant] claims his sentence is void because the sentencing entry did not specify that he was subject to three years mandatory post release control. It instead stated that three years post release control was optional. At [appellant’s] change of

plea and at his sentencing hearing, the court correctly told [him that he] faced three years of mandatory post release control. His change of plea journal entry also correctly stated that [appellant] faced three years of mandatory post release control. However, [appellant's] assertion that the sentencing entry failed to state the correct post release control sanction is correct.”

{¶17} The trial court held a hearing pursuant to R.C. 2929.191. Pursuant to its June 10, 2010 judgments, the trial court denied appellant’s oral motion to vacate his conviction, and included the correct mandatory postrelease control sanction in a nunc pro tunc entry. It is from those judgments that appellant filed the present pro se appeal, asserting the following assignments of error for our review:

{¶18} “[1.] The trial court abused its discretion and/or committed plain error in violation of the Ohio and United States Constitutions when the trial court resentenced the appellant, pursuant to R.C. 2929.191 as this remedial statute is in conflict with Crim.R. 32, Sup.R. 39, *State v. Owens*, 181 Ohio App.3d 725 ***, divesting the trial court of jurisdiction to re-sentence the appellant[.]

{¶19} “[2.] The trial court abused its discretion and/or committed plain error in violation of the Ohio and United States Constitutions when the court denied the appellant’s pre-sentence oral and written motions to withdraw his guilty plea based on his assertions he was not guilty in any way shape or form of the charges *State v. Cuthbertson* (2000), 139 Ohio App.3d 895 ***[.]

{¶20} “[3.] The trial court abused its discretion and/or committed plain error in violation of the Ohio and United States Constitutions when the court denied the appellant’s pre-sentence oral and written motions to withdraw his guilty plea when the

appellant demonstrated he was mentally unstable and under the influence of drugs at the time of his guilty plea[.]

{¶21} “[4.] The appellant was denied effective assistance of counsel, pursuant to the Ohio and United States Constitutions, by counsels (sic) failure and/or refusal to investigate the case, procure discovery, inform appellant of all plausible options, object and by coercing appellant to plead guilty for crimes he did not commit and to plead guilty while under the influence drugs and while mentally unstable[.]

{¶22} “[5.] The trial court abused its discretion and/or committed plain error in violation of the Ohio and United States Constitutions by sentencing the appellant consecutive for allied offenses of similar import, in violation of R.C. 2941.25(A) *State v. Ulrich*, 2009-Ohio-4610[.]

{¶23} “[6.] The trial court abused its discretion and/or committed plain error in violation of the Ohio and United States Constitutions by ordering a restitution order without first conducting an evidentiary hearing to determine whether the alleged victims actually sustained any damages in the amount claimed, as the appellant is indigent *State v. Riley*, (2009), *** 2009-Ohio-3227 *** (Ohio App. 6th Dist. Ct. App.)[.]

{¶24} “[7.] The trial court abused its discretion and/or committed plain error in violation of the Ohio and United States Constitutions by vindictively making a pre determination of the appellants (sic) sentence prior to the sentence hearing, *State v. Garrett*, *** (Ohio App.2nd, Dist. Ct. App., 2008-Ohio-1752[.])”

{¶25} In his first assignment of error, appellant argues that the trial court abused its discretion and/or committed plain error by resentencing him, pursuant to R.C. 2929.191, in conflict with Crim.R. 32 and Sup.R. 39.

{¶26} Crim.R. 32(A) provides in part: “Sentence shall be imposed without unnecessary delay.”

{¶27} Sup.R. 39(B)(4) states in part: “Provided the defendant in a criminal case is available, the court shall impose sentence or hold a sentencing hearing with all parties present within fifteen days of the verdict or finding of guilt or receipt of a completed pre-sentence investigation report.”

{¶28} The General Assembly enacted R.C. 2929.191, effective July 11, 2006, establishing a simple procedure to correct a sentence that omitted proper notification regarding postrelease control. Moreover, a sentence containing an improper postrelease control supervision term made after the effective date of R.C. 2929.191 does not render a sentence void. See *State v. McKinney*, 11th Dist. No. 2010-T-0011, 2010-Ohio-6445, at ¶30. Appellant was originally sentenced on July 17, 2008, over two years after the enactment of R.C. 2929.191. Although the postrelease control sanction in the original judgment was incorrect, appellant was sentenced “without unnecessary delay.” Crim.R. 32(A). As will be discussed, the postrelease control correction relates back to the original sentence as if it had been included, and, therefore, Crim.R. 32(A) was satisfied. Also, Superintendence Rules are “merely guidelines for judges which cannot be used by criminal defendants seeking a dismissal of their case.” *State v. Miller* (Aug. 22, 1997), 11th Dist. No. 96-P-0253, 1997 Ohio App. LEXIS 3779, at *5. Therefore, appellant’s reliance on Sup.R. 39 is misplaced.

{¶29} Because appellant was originally sentenced well after the effective date of R.C. 2929.191, it applies to our case.

{¶30} “R.C. 2929.191 applies to sentenced offenders who have not yet been released from prison and who fall into at least one of the three categories: (1) those who did not receive notice at the sentencing hearing that they would be subject to post-release control, (2) those who did not receive notice that the parole board could impose a prison term for a violation of post-release control, or (3) those who did not have both of these statutorily-mandated notices incorporated into their sentencing entries. R.C. 2929.191 (A) and (B).

{¶31} “For such offenders, R.C. 2929.191 provides that trial courts may, after holding a hearing with notice to the offender, the prosecuting attorney, and the department of rehabilitation and correction, prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction a statement that the offender will be supervised under post-release control after the offender leaves prison and that the parole board may impose a prison term of up to one-half of the stated prison term originally imposed if the offender violates post-release control. R.C. 2929.191(A)(1). If the court prepares such a correction, the court shall place upon its journal an entry nunc pro tunc to record the correction to judgment of conviction. R.C. 2929.191(A)(2). The court’s placement upon the journal of the entry nunc pro tunc before the offender is released from imprisonment shall be considered, and shall have the same effect, as if the court at the time of original sentencing had included the statement in the sentence and the judgment of conviction entered on the journal and had notified the offender that the offender would be subject to post-release control. *Id.* The offender has the right to be present at the hearing, but the court on its own motion or on the motion of the state or the defense, may permit the offender to appear at the

hearing by video conferencing equipment if available and compatible. R.C. 2929.191(C). At the hearing, the state and the offender may make a statement as to whether the court should issue a correction to the judgment of conviction.” *McKinney*, supra, at ¶18 & 19.

{¶32} In *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, the Supreme Court of Ohio considered the effect of R.C. 2929.191 and held that sentences imposed without the postrelease control sanction after the effective date of R.C. 2929.191 remain in effect, but are subject to the correction procedure set forth in the statute, and, therefore, are not void. *Id.* at ¶24.

{¶33} Again, pursuant to its April 23, 2010 judgment entry, the trial court determined that the July 17, 2008 sentencing entry failed to state the correct postrelease control sanction. Therefore, the trial court held a hearing pursuant to R.C. 2929.191. On June 10, 2010, the trial court issued a nunc pro tunc sentencing entry including the correct mandatory postrelease control sanction. Moreover, that correction has the same effect as if the court had originally included it in appellant’s sentence. R.C. 2929.191; *McKinney*, supra, at ¶18 & 19. We determine that the trial court properly followed R.C. 2929.191.

{¶34} Appellant’s first assignment of error is without merit.

{¶35} A review of appellant’s second, third, fourth, fifth, and sixth assignments of error reveals they are barred by the doctrine of *res judicata*.

{¶36} “[P]rinciples of *res judicata* prevent relief on successive, similar motions raising issues which were or could have been raised originally.” *Brick Processors, Inc. v. Culbertson* (1981), 2 Ohio App.3d 478, paragraph one of the syllabus. Stated

differently, any issues that were raised or could have been raised by a defendant at the trial court level or on direct appeal are res judicata and not subject to review in subsequent proceedings. *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus; *State v. Davis*, 119 Ohio St.3d 422, 2008-Ohio-4608, at ¶6.

{¶37} Additionally, res judicata applies to proceedings involving postconviction relief. *State v. Szefcyk* (1996), 77 Ohio St.3d 93, 95. However, the application of res judicata in postconviction proceedings is not absolute. *State v. Smith*, 4th Dist. No. 09CA3128, 2011-Ohio-664, at ¶10.

{¶38} The doctrine of res judicata may be overcome in a postconviction proceeding if the petitioner presents competent, relevant, and material evidence outside the record. *State v. Lawson* (1995), 103 Ohio App.3d 307, 315, citing *State v. Smith* (1985), 17 Ohio St.3d 98, 101, fn. 1. “However, the evidence presented outside the record must meet some threshold standard of cogency; otherwise, it would be too easy to defeat the res judicata doctrine by simply attaching as exhibits evidence which is only marginally significant and does not advance the petitioner’s claim beyond mere hypothesis and a desire for further discovery.” *In re J.B.*, 12th Dist. Nos. CA2005-06-176, CA2005-07-193, CA2005-08-377, 2006-Ohio-2715, at ¶16. “Moreover, claims that could have been raised based on evidence in the record are also barred by res judicata even though the petitioner may have presented some additional evidence outside the record.” *State v. Turner*, 10th Dist. No. 04AP-1143, 2006-Ohio-761, at ¶8, citing *State v. Cole* (1982), 2 Ohio St.3d 112, at the syllabus, and *State v. Combs* (1994), 100 Ohio App.3d 90, 97.

{¶39} Appellant's second and third assignments of error deal with his motions to withdraw his guilty plea. In his second assignment of error, appellant argues that his sentence was void and that he is innocent. In his third assignment of error, appellant contends that he was mentally unstable and under the influence of drugs at the time of his plea.

{¶40} As indicated previously, appellant's sentence was never void. Thus, appellant filed what amounted to two postsentence motions to withdraw his guilty plea. On November 5, 2009, appellant filed a pro se motion to withdraw his guilty plea, the sole basis asserted was that he was entitled to a hearing to determine whether his offenses were allied offenses of similar import. The trial court denied his motion and it was never appealed. Thereafter, on April 1, 2010, appellant filed a pro se motion captioned "Defendant's Omnibus Motion 'Evidentiary Hearing Requested[,]'" including, inter alia, a motion to withdraw his guilty plea, alleging that he should be able to withdraw his plea because he is innocent, was mentally unstable and under the influence of drugs at the time of his plea, and his sentence was void. None of these grounds were argued in his first motion to withdraw his plea. The trial court denied his motion.

{¶41} With respect to appellant's claims contained in his second and third assignments of error, the trial court correctly found the doctrine of res judicata applicable. For the reasons previously stated, appellant's argument that his sentence was void is incorrect. Appellant's contentions that he is innocent and was mentally unstable and under the influence of drugs at the time of his plea are allegations that, if

true, would have been known to him when he filed his first motion to withdraw his plea. However, he did not raise them. Thus, res judicata applies.

{¶42} Appellant's second and third assignments of error are without merit.

{¶43} In his fourth assignment of error, appellant alleges that his counsel failed and/or refused to investigate the case, procure discovery, inform him of all plausible options, object, and coerced him to plead guilty while under the influence of drugs and mentally unstable. All of these issues were either in the record and capable of being brought on direct appeal from appellant's original sentence or were matters outside the record which were brought or capable of being brought on postconviction relief.

{¶44} Specifically, appellant's contentions that his counsel failed and/or refused to investigate the case and procure discovery were brought in his petition for postconviction relief five months after his sentence. Those contentions are barred by res judicata. Appellant's allegations that his counsel failed to inform him of all plausible options and coerced him to plead guilty while under the influence of drugs and mentally unstable are matters outside the record. These matters would have been known to appellant when he filed his first petition for postconviction relief but were not advanced. Therefore, they are barred by res judicata. Appellant's contention regarding his counsel's failure to object is unclear. However, such a contention would typically involve something that would have been of record, and therefore, capable of being brought on direct appeal. It was not. Thus, appellant's contention is barred by res judicata.

{¶45} Appellant's fourth assignment of error is without merit.

{¶46} In his fifth assignment of error, appellant contends that the trial court erred by sentencing him consecutively for allied offenses of similar import.

{¶47} We are aware that in a recent decision, *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, the Supreme Court of Ohio overruled *State v. Rance* (1999), 85 Ohio St.3d 632, and revised the allied offenses analysis. Under the new analysis, “[w]hen determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered.” *Id.* at the syllabus. However, in both the civil and criminal context, a change in decisional law does not alter or bar the application of the doctrine of res judicata. *LaBarbera v. Batsch* (1967), 10 Ohio St.2d 106, 109-111; *State v. Szefcyk* (1996), 77 Ohio St.3d 93, 95.

{¶48} Appellant’s sentencing argument concerning allied offenses could have been raised on direct appeal. It was not. Thus, this argument is barred by res judicata.

{¶49} Appellant’s fifth assignment of error is without merit.

{¶50} Appellant’s sixth assignment of error deals with his sentence. Appellant alleges that the trial court erred by ordering restitution. However, this could have been raised on direct appeal. It was not. Thus, this argument is barred by res judicata and meritless.

{¶51} In his seventh assignment of error, appellant asserts that the trial court’s resentencing was the result of bias and vindictiveness. Appellant contends that the trial court made a resentencing predetermination because, prior to the resentencing hearing, the court entered an order stating that after transport from prison to the court for resentencing appellant was to be returned to prison to serve the remainder of his term.

{¶52} It appears that appellant takes issue with the fact that when he was brought back for resentencing to impose postrelease control, he was entitled to a full sentencing hearing. However, he was not. As previously determined, the trial court properly resentenced appellant on the postrelease control portion. Moreover, the imposition of the proper postrelease control would not change the fact that appellant would still have to serve the remainder of his sentence. Thus, there was nothing improper about the court ordering appellant's transport from prison to the court for imposition of the proper postrelease control and immediately back to prison. The record does not establish any predetermined bias or vindictiveness.

{¶53} Appellant's seventh assignment of error is without merit.

{¶54} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Lake County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.

