

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

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2015-T-0095
LANCE POUGH,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 00 CR 280.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Lance Pough, pro se, PID# A653-422, Richland Correctional Institution, P.O. Box 8107, 1001 Olivesburg Road, Mansfield, OH 44905 (Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Lance Pough, appeals from the Judgment Entry of the Trumbull County Court of Common Pleas, denying his motions requesting to withdraw his guilty plea and for the trial court to “correct” its judgment. The issues to be decided by this court are whether a motion to withdraw a plea should be granted when the trial court fails to include in its sentencing entry a post-release control requirement of

which the defendant had been orally advised, whether such a claim is barred by the doctrine of res judicata, and whether a nunc pro tunc entry should be issued given these circumstances. For the following reasons, we affirm the decision of the court below.

{¶2} On May 5, 2000, the Trumbull County Grand Jury returned an indictment against Pough for his role in the 1998 death of Braderick McMillan. He was charged with Aggravated Murder and Conspiracy to Commit Aggravated Murder.

{¶3} Pursuant to the terms of a plea agreement, Pough entered a guilty plea to an amended count of Complicity to Commit Murder, in violation of R.C. 2923.03(A)(1) and 2903.02(A), along with a firearm specification, in violation of R.C. 2941.145(A).

{¶4} In a November 30, 2000 Entry on Sentence, Pough was ordered to serve a term of fifteen years to life in prison, along with three years for the firearm specification, to be served concurrently with the sentence Pough was serving in federal prison on Case No. 4:98-CR-234.

{¶5} Pough appealed to this court and argued that his plea was not knowing and voluntary and his trial counsel was ineffective. On December 13, 2002, in *State v. Pough*, 11th Dist. Trumbull No. 2000-T-0151, 2002-Ohio-6927, this court found Pough's guilty plea was valid and affirmed the trial court.

{¶6} On July 15, 2003, Pough filed a petition for postconviction relief which was denied by the trial court. This court affirmed that decision in *State v. Pough*, 11th Dist. Trumbull No. 2003-T-0129, 2004-Ohio-3933.

{¶7} On October 28, 2009, the trial court denied Pough's Motion for Sentencing Clarification. This court affirmed, holding that Pough was not entitled to credit for time

served in a federal case. *State v. Pough*, 11th Dist. Trumbull No. 2010-T-0117, 2011-Ohio-3630, ¶ 22.

{¶8} On June 8, 2015, Pough filed a Presentence [sic] Motion to Withdraw the Guilty Plea for the Breach By the State Authorities, ODRC, [and] Adult Parole Authorities. In this Motion, he argued that his guilty plea was not intelligently given since he had been advised during the plea process that he would receive post-release control but was not ordered to be placed on such control. This led to confusion regarding whether he would be required to follow the terms of parole supervision if parole was granted. On the same date, Pough filed a Motion Requesting a Revised Sentencing Entry, contending that the court should amend its judgment to place him on post-release control when/if he is released from prison.

{¶9} On July 23, 2015, Pough filed a Motion for Correction of Judgment Pursuant to Crim. Rule 36, asserting a nunc pro tunc entry should be issued on the foregoing ground. On the same date, he filed a Motion Seeking Leave to Amend the 32.1 Motion, requesting leave to add “a Boykin v. Alabama claim.”

{¶10} The State filed a Response on August 3, 2015.

{¶11} On August 4, 2015, the trial court filed a Judgment Entry denying Pough’s motions.

{¶12} Pough timely appeals and raises the following assignments of error:

{¶13} “[1.] The Trial Court committed plain error and abused its discretion by not holding an evidentiary hearing on the motion to withdraw the plea before denying it, whereas the facts alleged by the defendant-appellant Pough were accepted as true.

{¶14} “[2.] The Trial court committed plain error by not granting the Defendant-Appellant’s Criminal Rule 36 Motion.

{¶15} “[3.] The Trial court committed plain error by not granting Defendant-Appellant relief on claim one, whereas his plea was not knowing[ly], intelligent[ly], or voluntarily made because it was illusory, based on an unfulfilled promise as to the terms of his plea agreement which weren’t fulfilled, all of which resulted in a violation of his rights under the 14th Amendment of the U.S. Constitution.

{¶16} “[4.] The Trial Court committed plain error and abused its discretion when it denied claim two in the motion to withdraw the plea whereas the Plea agreement, the Judge’s Intentions and the Oral Pronouncement of Sentences controls over the written entry.

{¶17} “[5.] The Trial Court committed plain error and abused its discretion by not granting the Defendant-Appellant permission to withdraw his plea based on Claim 3 of the plea withdrawal motion, which is a claim alleging that the plea is illegal whereas it has terms and promises in it that are not authorized pursuant to the permissible state statute for the crime in which petitioner pled guilty to.

{¶18} “[6.] The Trial Court committed plain error and abused its discretion by not granting Defendant-Appellant permission to withdraw his plea based on Claim 4 of the motion to withdraw the plea in the trial/State court whereas the plea agreement is ambiguous whereas it has two types of supervision—PRC supervision and Parole, and it is violative of due process and a violation of Appellant’s federal rights * * *.

{¶19} “[7.] The trial court committed plain error and abused its discretion when it failed to grant him relief on Claim 5 of the plea withdrawal motion whereas his right[] to

due process under federal law and the U.S. Constitution was violated by the State authorities, ODRC, Adult Parole Authorities, and the trial court's failure to give him credit (11 months 16 days) on his state sentence for the entire time he spent in federal custody from the day of his arrest.

{¶20} “[8.] The Trial court abused its discretion and committed plain error when it denied Defendant-Appellant's leave to amend the 32.1 motion to withdraw the plea with the Boykin v. Alabama claim in light of the fact that the claim has merit and the state has yet to respond and reply to the 32.1 motion.”

{¶21} We will consider Pough's first, third, fourth, fifth, and sixth assignments of error jointly, as they involve similar issues related to his Motion to Withdraw Guilty Plea. Pough claims that he should be permitted to withdraw his plea because he had been informed he would be placed on post-release control during the plea and sentencing proceedings, but this finding was not made in the sentencing entry. He also contends that the plea was ambiguous regarding post-release control and parole, apparently giving rise to the belief that he would not be subject to the terms of parole.

{¶22} “A motion made pursuant to Crim.R. 32.1 is addressed to the sound discretion of the trial court, and the good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by that court.” *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph two of the syllabus.

{¶23} Initially, we note that Pough's arguments to withdraw his plea on the grounds outlined above are barred by the doctrine of res judicata. As this court has continually held, “[r]es judicata applies to postsentence motions to withdraw guilty pleas and prevents a defendant from raising issues that could have been raised in a previous

motion.” *State v. Wise*, 11th Dist. Trumbull No. 2013-T-0033, 2013-Ohio-4632, ¶ 16; *State v. McDonald*, 11th Dist. Lake No. 2003-L-155, 2004-Ohio-6332, ¶ 22 (“[r]es judicata bars claims raised in a Crim.R. 32.1 post-sentence motion to withdraw guilty plea that were raised or could have been raised in a prior proceeding”). Also *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶ 59. Pough has filed multiple appeals, with one questioning the voluntariness of his plea and another based on a motion to withdraw his plea. While Pough now raises different grounds to support his contention that the plea was involuntary, that he was advised of but not sentenced to post-release control, he provides no argument as to why this could not have been raised previously. The fact that the trial court did not include post-release control in its sentencing entry was obvious in 2000 from a simple review of that entry.

{¶24} It is also noteworthy that “[a]n 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.” *Smith* at paragraph three of the syllabus. Pough filed his Motion to Withdraw the Guilty Plea approximately 15 years after the plea had been entered.

{¶25} Even if it were necessary to consider the merits of Pough’s arguments, they would fail. It is true that Pough was advised by the trial court at sentencing that he was required to serve post-release control if released from prison. Although Pough requests that he now be “resentenced” and ordered to complete post-release control, there is no basis to do so under the law. An individual sentenced to an unclassified felony, such as murder, is not subject to post-release control. *State v. Clark*, 119 Ohio

St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 36; R.C. 2967.28. Further, Pough does not and cannot contend that his sentence is either void or voidable relating to the post-release control issue, since it was never made part of his sentence.

{¶26} More importantly, while the plea agreement and discussions surrounding the entry of Pough's plea mentioned the post-release control requirement, this seemingly had little impact on Pough's decision to enter a guilty plea. Pough's plea allowed him to avoid a potential death sentence. He was advised that he would serve 15 years to life, which is properly stated in the sentencing entry. Given the nature of his sentence, there can be no merit to an argument that Pough did not know he would be subject to the parole process to obtain release and for subsequent supervision.

{¶27} Finally, Pough's claim that a hearing was necessary lacks merit. "[A] trial court need not hold an evidentiary hearing on a post-sentence motion to withdraw a guilty plea if the record indicates the movant is not entitled to relief and the movant has failed to submit evidentiary documents sufficient to demonstrate a manifest injustice." (Citation omitted.) *State v. Caskey*, 11th Dist. Lake No. 2010-L-014, 2010-Ohio-4697, ¶ 11. This is especially applicable in matters barred by res judicata. See *State v. Gilmore*, 8th Dist. Cuyahoga No. 97884, 2012-Ohio-3962, ¶ 23.

{¶28} The first, third, fourth, fifth, and sixth assignments of error are without merit.

{¶29} In his second assignment of error, Pough argues that the trial court should have, in response to his motion, issued a nunc pro tunc entry correcting its failure to include post-release control in its sentencing judgment entry.

{¶30} Pursuant to Crim.R. 36, “[c]lerical mistakes in judgments * * * and errors in the record arising from oversight or omission, may be corrected by the court at any time.”

{¶31} We do not find that there has been a clerical error subject to correction. As noted above, post-release control is not applicable in murder cases and thus, would not be properly included in the sentencing entry. Regardless of the fact that the court orally informed Pough that he was subject to post-release control, we note that “any oral pronouncements by [the court are] subject to revision before journalization,’ inasmuch as a ‘court of record speaks only through its journal and not by oral pronouncement or mere written minute or memorandum.” (Citation omitted.) *State v. Patterson*, 11th Dist. Trumbull No. 2013-T-0062, 2015-Ohio-4423, ¶ 105, citing *State ex rel. Marshall v. Glavas*, 98 Ohio St.3d 297, 2003-Ohio-857, 784 N.E.2d 97, ¶ 5.

{¶32} The second assignment of error is without merit.

{¶33} In his seventh assignment of error, Pough argues that the trial court erred by not allowing him to withdraw his plea on the ground that he was not given jail credit for time served in federal prison.

{¶34} This argument is barred by res judicata for the reasons stated above. In addition, this exact argument has been raised by Pough and rejected by this court. *Pough*, 2011-Ohio-3630, at ¶ 21-25.

{¶35} The seventh assignment of error is without merit.

{¶36} In his eighth assignment of error, Pough argues that his plea was involuntary under *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), since he was not adequately informed of the consequences of the plea.

{¶37} Pursuant to *Boykin*, the court must advise a defendant of certain constitutional rights that are waived when he enters a guilty plea. *Id.* at 243. These rights are outlined in Crim.R. 11(C). This court previously examined the record and the advisements given to Pough, and found that the court was in strict compliance with the requirements of Crim.R. 11(C). *Pough*, 2002-Ohio-6927, at ¶ 28. To the extent that this argument merely reasserts the claim that his plea was not knowingly entered due to the post-release control issue, it fails for the reasons discussed above.

{¶38} The eighth assignment of error is without merit.

{¶39} For the foregoing reasons, the Judgment Entry of the Trumbull County Court of Common Pleas, denying Pough's Motions, is affirmed. Costs to be taxed against the appellant.

THOMAS R. WRIGHT, J.,

COLLEEN MARY O'TOOLE, J.,

concur.