[Cite as *State v. Walden*, 2016-Ohio-258.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
DEFIANCE COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 4-15-13**

v.

JASON D. WALDEN, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Defiance County Common Pleas Court
Trial Court No. 10-CR-10910

Judgment Affirmed

Date of Decision: January 25, 2016

APPEARANCES:

Clayton J. Crates **for Appellant**

Russell R. Herman **for Appellee**

ROGERS, J.

{¶1} Defendant-Appellant, Jason Walden, appeals the judgment of the Court of Common Pleas of Defiance County denying his post-sentence motion to withdraw his guilty plea. On appeal, Walden argues that (1) he received ineffective assistance of counsel; (2) the trial court erred by failing to comply with Crim.R. 11; (3) the trial court erred by sentencing him on two allied offenses of similar import; and (4) the trial court erred by advising him that he was subject to a discretionary period of post-release control. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} On July 22, 2010, the Defiance County Grand Jury returned a six count indictment against Walden charging him with one count of illegal assembly or possession of chemicals for the manufacture of drugs in violation of R.C. 2925.041, a felony of the third degree; one count of illegal manufacture of drugs in violation of R.C. 2925.04(A)(C)(3)(a), a felony of the second degree; one count of aggravated possession of drugs in violation of R.C. 2925.11(A)(C)(1)(e), a felony of the first degree; two counts of aggravated possession of drugs in violation of R.C. 2925.11(A)(C)(1)(a), a felony of the fifth degree; and one count of possession of heroin in violation of R.C. 2925.11(A)(C)(6)(a), a felony of the fifth degree.

{¶3} On May 11, 2011, Walden entered a plea of no contest to one count of illegal assembly or possession of chemicals for the manufacture of drugs in violation of R.C. 2925.041, a felony of the third degree, and one count of illegal manufacture of drugs in violation of R.C. 2925.04(A)(C)(3)(a), a felony of the second degree. In exchange for his plea, the State dismissed all remaining charges.

{¶4} Thereafter, the trial court entered findings of guilt and sentenced Walden to two years in prison on the assembly/possession conviction and three years in prison on the illegal manufacture conviction. The sentences were imposed consecutively for a total prison term of five years.[1]

{¶5} At both the plea and sentencing hearing, the trial court advised Walden that he may be subject to up to three years of post-release control. Walden's conviction and sentence were later journalized in an entry, which stated that "upon his release from prison, [Walden] is subject to a *mandatory* period of three years of post-release control." (Emphasis sic.) (Docket No. 10, p. 5).

{¶6} On March 16, 2015, nearly four years after his conviction, Walden filed a pro-se motion to withdraw his guilty plea, arguing that "a manifest injustice is extant because [trial counsel] provided ineffective assistance of counsel when he advised [Walden] to plead to allied offenses" and therefore, Walden's plea was not

[1] Walden's sentences were also imposed consecutively to an unrelated sentence out of Indiana.

knowingly, voluntarily, and intelligently made. (Docket No. 18, p. 3). Walden further claimed that the trial court erred in sentencing him on two allied offenses of similar import.

{¶7} By entry dated May 12, 2015, the trial court denied Walden's motion.

{¶8} It is from this judgment that Walden appeals, presenting the following assignments of error for our review.[2]

Assignment of Error No. I

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO WITHDRAW PLEA WITHOUT AN EVIDENTIARY HEARING.

Assignment of Error No. II

THE TRIAL COURT COMMITTED ERROR BY DENYING APPELLANT'S MOTION TO WITHDRAW PLEA.

Assignment of Error No. III

SENTENCING APPELLANT ON ALLIED OFFENSES OF SIMILAR IMPORT CONSTITUTES A VOID SENTENCE.

Assignment of Error No. IV

TRIAL COURT COMMITTED ERROR BY FAILING TO PROPERLY ADVISE APPELLANT OF MANDATORY POST-RELEASE CONTROL.

[2] Although an indigent defendant has "no constitutional or statutory right to appointed counsel regarding collateral attacks or discretionary appeals", upon Walden's motion, the trial court appointed counsel to represent Walden for purposes of this appeal. *State v. Watts*, 57 Ohio App.3d 32, 33 (6th Dist.1989).

{¶9} Due to the nature of Walden's assignments of error, we elect to address some assignments of error together.

Assignments of Error Nos. I, II, & III

{¶10} In his first, second, and third assignments of error, Walden argues that the trial court erred by denying his post-sentence motion to withdraw his guilty plea and sentencing him on two allied offenses of similar import. Specifically, Walden argues that a manifest injustice arose after (1) trial counsel erroneously advised him to enter a plea of no contest to two allied offenses of similar import and (2) the trial court failed to advise him that he was entering a plea of no contest to two allied offenses of similar import. To that end, Walden also claims that the trial court erred in failing to merge the two offenses at sentencing pursuant to R.C. 2941.25. We disagree.

{¶11} Appellate review of the trial court's denial of a motion to withdraw a guilty plea is limited to whether the trial court abused its discretion. *State v. Nathan*, 99 Ohio App.3d 722, 725 (1995), citing *State v. Smith*, 49 Ohio St.2d 261 (1977). A trial court will be found to have abused its discretion when its decision is contrary to law, unreasonable, not supported by the evidence, or grossly unsound. *State v. Boles*, 187 Ohio App.3d 345, 2010-Ohio-278, ¶ 16-18 (2d Dist.). When applying the abuse of discretion standard, a reviewing court may not

simply substitute its judgment for that of the trial court. *State v. Slappey*, 3d Dist. Marion No. 9-12-58, 2013-Ohio-1939, ¶ 12.

{¶12} Crim.R. 32.1 provides that "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." The party moving to withdraw his plea of guilty post-sentence bears the burden of establishing a manifest injustice. *Smith* at paragraph one of the syllabus.

{¶13} A manifest injustice has been defined as a "clear or openly unjust act." *State v. Walling*, 3d Dist. Shelby No. 17-04-12, 2005-Ohio-428, ¶ 6, quoting *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208 (1998). Accordingly, a post-sentence motion to withdraw a guilty plea is granted only in "extraordinary cases." *Smith* at 264.

{¶14} "A hearing on a post-sentence motion to withdraw guilty plea is not mandatory. It is required only 'if the facts alleged by the defendant and accepted as true would require the court to permit that plea to be withdrawn.' " *State v. Moore*, 3d Dist. Allen No. 1-11-29, 2012-Ohio-657, ¶ 13, quoting *State v. Hamed*, 63 Ohio App.3d 5, 7 (8th Dist.1989). In other words, before a defendant is entitled to a hearing on a post-sentence motion to withdraw guilty plea, the trial

court must conclude that the defendant's allegation, if taken as true, demonstrates a manifest injustice. *Moore* at ¶ 13.

{¶15} Here, Walden seeks to withdraw his pleas of no contest on the grounds that "[trial counsel] provided ineffective assistance when he advised [Walden] to plead to allied offenses." (Docket No. 18, p. 3). An ineffective assistance of counsel claim requires proof that trial counsel's performance fell below an objective standard of reasonable representation and that the defendant was prejudiced as a result. *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus. "To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, but for counsel's errors, the outcome at trial would have been different." *Id*. at paragraph three of the syllabus. "Reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. *State v. Waddy*, 63 Ohio St.3d 424, 433 (1992), *superseded by constitutional amendment on other grounds as recognized by State v. Smith*, 80 Ohio St.3d 89, 103 (1997).

{¶16} "Further, the court must look to the totality of the circumstances and not isolated instances of an allegedly deficient performance." *State v. Barnett*, 3d Dist. Logan No. 8-12-09, 2013-Ohio-2496, ¶ 45. "Ineffective assistance does not exist merely because [trial] counsel failed 'to recognize the factual or legal basis

for a claim, or failed to raise the claim despite recognizing it.' " Id., quoting *Smith v. Murray*, 477 U.S. 527, 535, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986).

{¶17} Under R.C. 2941.25, Ohio's allied offense statute, "[A]n indictment may contain multiple counts for all such offenses, and the accused can be tried and found to be guilty of all the counts but may only be convicted of one." *State v. West*, 3d Dist. Union No. 14-94-37, 1995 WL 232795, *3 (April 13, 1995). After a defendant is found guilty of multiple offenses of similar import, the trial court has a duty to merge those counts at sentencing. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶ 26.

{¶18} Assuming, arguendo, that the two offenses were allied offenses of similar import under R.C. 2941.25, trial counsel was not ineffective by advising Walden to enter a plea of no contest to both offenses. R.C. 2941.25 does not prevent a defendant from entering a plea of no contest and being found guilty of two allied offenses of similar import; rather, it operates to prevent a defendant from being sentenced on both offenses. In other words, application of R.C. 2941.25 is necessarily predicated upon either multiple pleas of guilty or multiple findings of guilt.

{¶19} Next, Walden argues that the trial court erred by (1) failing to comply with Crim.R. 11 insofar as it did not determine whether the two offenses were allied offenses of similar import prior to accepting his no-contest pleas and

(2) sentencing him on two allied offenses of similar import.[3] Both of Walden's claims are barred by res judicata.

> Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in a judgment in that conviction, or on an appeal from that judgment.

State v. Perry, 10 Ohio St.2d 175, 226 (1967), paragraph nine of the syllabus. " '[R]es judicata promotes the principles of finality and judicial economy by preventing endless relitigation of an issue on which a defendant has already received a full and fair opportunity to be heard.' " *State v. Schwieterman*, 3d Dist. Mercer No. 10–09–12, 2010–Ohio–102, ¶ 23, quoting *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, ¶ 18. "Res judicata bars all claims raised in a Crim.R. 32.1 motion that were raised or could have been raised in a prior proceeding." *State v. Coats*, 3d Dist. Mercer Nos. 10–09–04, 10–09–05, 2009–Ohio–3534, ¶ 16, citing *State v. Sanchez*, 3d. Dist. Mercer No. 4-06-31, 2007-Ohio-218, ¶ 18; *see also State v. Helser*, 3d Dist. Allen No. 1-09-04, 2009-Ohio-3155, ¶ 13 (double jeopardy claim barred by res judicata where alleged error could have been raised on direct appeal); *State v. Breininger*, 3d Dist. Defiance No. 4-05-14, 2005-Ohio-

[3] The State has disputed the allegation that the convictions were for allied offenses of similar import, arguing that the charges involved different acts on different dates, however, we need not reach that issue.

4748, ¶ 12 (Crim.R. 11 claim barred by res judicata where alleged error was apparent from the record).

{¶20} Here, Walden could have raised his claims relating to R.C. 2941.25 and Crim.R. 11 on direct appeal because each claim is based on matters apparent from the record. For this reason, res judicata bars Walden from challenging these aspects of his conviction and sentence through a post-sentence motion to withdraw his guilty plea.

{¶21} Based on the foregoing, we cannot say that the trial court abused its discretion in denying Walden's post-sentence motion to withdraw his guilty plea without a hearing.

{¶22} Accordingly, we overrule Walden's first, second, and third assignments of error.

Assignment of Error No. IV

{¶23} In his fourth assignment of error, Walden argues that the trial court failed to notify him of the mandatory nature of his post-release control, but Walden's assignment of error is entirely unrelated to the judgment identified in his notice of appeal.

{¶24} "[An appellate court] ha[s] jurisdiction to review assignments of error stemming only from the judgment subject of the notice of appeal." *State v. Thompkins*, 10th Dist. Franklin No. 07AP-74, 2007-Ohio-4315, ¶ 7, citing App.R.

3(D). In other words, "assignments of error must relate to the judgment that is the subject of the notice of appeal." *State v. Darks*, 10th Dist. Franklin No. 12AP-578, 2013-Ohio-176, ¶ 6, citing *Thompkins* at ¶ 7; *see also State v. Smith*, 6th Dist. Lucas No. L–10–1150, 2011–Ohio–5945, ¶ 3 (proposed assignments of error not properly before the court because the proposed errors do not relate to the judgment on appeal).

{¶25} Here, Walden's claim concerning the trial court's imposition of post-release control was never raised in his March 2015 motion to withdraw his guilty plea nor considered in the trial court's May 2015 entry—the entry identified in the notice of appeal.[4]

{¶26} Based on the foregoing, we lack jurisdiction to consider Walden's fourth assignment of error. Accordingly, Walden's fourth assignment of error is overruled.

{¶27} Having found no error prejudicial to Walden, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

PRESTON and WILLAMOWSKI, J.J., concur.

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[4] On September 15, 2015, appellate counsel filed an "Amended Notice of Appeal" seeking to incorporate the original judgment entry of conviction and sentence into the present notice of appeal. This court denied appellate counsel's request noting that a notice of appeal cannot be amended to include a judgment entry filed nearly four years earlier. App.R. 4.