

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY

STATE OF OHIO,	:	
	:	Case No. 15CA14
Plaintiff-Appellee,	:	
	:	
vs.	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
MARK D. FRAZIER,	:	
	:	
Defendant-Appellant.	:	Released: 07/14/16

APPEARANCES:

Mark D. Frazier, Chillicothe, Ohio, Pro Se Appellant.

Judy C. Wolford, Pickaway County Prosecutor, and Heather MJ Armstrong,
Assistant Pickaway County Prosecutor, Circleville, Ohio, for Appellee.

McFarland, J.

{¶1} Mark D. Frazier appeals the April 3, 2015 judgment of the Pickaway County Court of Common Pleas, overruling his motion to withdraw a guilty plea previously entered on November 9, 2009. On the delayed appeal, Appellant asserts that he has satisfied the standard of manifest injustice and, therefore, his conviction for the offense of having a weapon under disability must be vacated. Having reviewed the record, we find no merit to his arguments. As such, we overrule the sole assignment of error and affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

{¶2} We generally recount the facts as set forth in *State v. Frazier*, 4th Dist. Pickaway No. 10CA15, 2011 WL 856964, (March 9, 2011), ¶ 4. Frazier, “Appellant,” faced two separate indictments. In the first one, the grand jury indicted him on May 8, 2009 (Case Number 09-CR-134) on one count of aggravated burglary, one count of felonious assault, and one count of attempted theft of drugs, all with firearm specifications. In the second indictment, the grand jury indicted Appellant on August 9, 2009 (Case Number 09-CR-242) on four counts of aggravated trafficking in drugs, one count of having weapons while under disability, and one count of possession of drugs. The second indictment arose from activities which occurred on June 15, 18, and 23, 2009, as well as July 30, 2009, in Pickaway County. On August 12, 2009, he was arraigned. On September 18, 2009, Appellant entered pleas to all six counts in the second indictment in exchange for the State’s agreement to dismiss the first indictment.

{¶3} Appellant was passed for a pre-sentence investigation. On January 20, 2010, at sentencing, the trial court began by stating that the court had received a letter from Appellant, pro se, in which Appellant requested to withdraw his guilty pleas with respect to the weapons under disability charge. During a lengthy colloquy between Appellant and the trial court, Appellant asserted that no one told him he was not allowed to have a weapon while under indictment. The trial court

ruled that there was no basis for which to grant Appellant permission to withdraw the guilty plea.

{¶4} Appellant was eventually granted a delayed appeal. In *Frazier I*, one of his arguments was that he did not knowingly, voluntarily, and intelligently plead guilty to the charges because the trial court failed to notify him of the maximum penalty for the crimes. We held Appellant did not show that the trial court failed to substantially comply with the requirements of Crim.R. 11(C)(2)(a), and overruled the assignment of error.¹

{¶5} On March 25, 2015, Appellant filed a “Motion to Withdraw Plea” to count five of the second indictment, having a weapon while under disability. On April 3, 2015, the trial court denied the motion. This second delayed appeal followed.

ASSIGNMENT OF ERROR ONE

“I. THE COURT ERRED BY DENYING THAT TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO INFORM DEFENDANT THAT THE CHARGE FOR HAVING WEAPONS UNDER DISABILITY THAT WAS INVALID IN VIOLATION OF HIS 6TH AND 14TH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I OF THE OHIO CONSTITUTION.”

¹ Appellant challenged the trial court’s notification of maximum sentence, specifically, that if he failed to pay court-ordered costs, he could be ordered to perform community service. Because the issue did not involve a constitutional right, substantial compliance with Crim.R. 11(C)(2)(a) is sufficient. *Frazier I* at ¶ 8.

STANDARD OF REVIEW

{¶6} Despite the phrasing of the above assignment of error, this is essentially an appeal of the trial court's overruling of Appellant's motion to withdraw a previously entered plea. Crim.R. 32.1 provides: "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." *State v. Walton*, 4th Dist. Washington No. 13CA9, 2014-Ohio-618, ¶ 10. A defendant seeking to withdraw his plea after sentencing has the burden to establish that a manifest injustice will occur if the plea stands. *Walton, supra*, quoting *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus. A manifest injustice is "a clear or openly unjust act." *Walton, supra*, quoting *State v. Dotson*, 4th Dist. Washington No. 03CA53, 2004-Ohio-2768, ¶ 5, citing *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 699 N.E.2d 83 (1998). This is an "extremely high standard" that permits a defendant to withdraw his plea "only in extraordinary cases." *Walton, supra*, quoting *State v. Darget*, 4th Dist. Scioto No. 12CA3487, 2013-Ohio-603, ¶ 21.

{¶7} "[T]he decision to grant or deny a Crim.R. 32.1 motion is committed to the sound discretion of the trial court * * *. *Walton, supra*, at ¶ 11, quoting *Darget, supra*. Appellate review of the denial of a post-sentence motion to

withdraw a guilty plea is therefore limited to a determination of whether the trial court abused its discretion. *Id.* The term “abuse of discretion” connotes an attitude on the part of the court that is unreasonable, unconscionable, or arbitrary.’ ” *Id.* at ¶ 22, quoting *State v. Whitaker*, 4th Dist. Scioto No. 10CA3349, 2011-Ohio-6923, ¶ 9.

LEGAL ANALYSIS

{¶8} We begin by taking judicial notice of the information as to Appellant’s current status as provided on the Ohio Department of Corrections Offender website, www.drc.ohio.gov. The offender search link indicates Appellant was released from prison on January 11, 2016 and placed under the supervision of the Adult Parole Authority. In *State v. Popov*, 4th Dist. Lawrence No. 10CA26, 2011-Ohio-372, ¶ 5, we held:

“An appeal challenging a felony conviction is justiciable, i.e., not moot, even if the defendant has served sentenced because the defendant ‘has a substantial stake in the judgment of conviction which survives the satisfaction of the judgment imposed upon him or her.’ ” quoting *State v. Golston*, 71 Ohio St.3d 224, 643 N.E.2d 109, at paragraph one of the syllabus.

{¶9} Reviewing the record in the case sub judice, it appears Appellant has challenged his conviction since shortly after he entered his pleas because he believed he had a valid defense to the charge. Since his appeal does not challenge the length of his sentence, his appeal is justiciable in that he has a substantial stake

in having the weapons' charge on his record. As such, we will consider Appellant's assignment of error.

{¶10} In support of his motion to withdraw his previously entered plea, Appellant first contends his trial counsel was deficient for failing to inform him that the offense of having weapons under disability was "void/invalid" because Appellant was not served the first indictment in Case No. 09CR-134 until August 7, 2009, when he was lodged in the county jail. Appellant states this is the same day he was served the second indictment, in which was alleged the weapons under disability charge. Appellant advances the argument that he was not aware he was unable to have a weapon while under indictment, but thought the statute applied only to persons convicted of felonies.² Appellant concludes this error "renders that offense/indictment invalid/void," and that as such, a manifest injustice occurred.

{¶11} Secondly, Appellant argues that trial counsel was ineffective in that during the withdrawal of plea hearing, counsel did not represent Appellant or speak on his behalf. Appellant argues that counsel failed his client in that prior to the

² Having weapons while under disability, R.C. 2923.13, provides: (A) Unless relieved from disability under operation of law or legal process, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

* * *

(3) The person is under indictment for or has been convicted of any felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.

* * *

(C) For the purposes of this section, "under operation of law or legal process" shall not itself include mere completion, termination, or expiration of a sentence imposed as a result of a criminal conviction.

change of plea hearing, at the change of plea hearing, and again at the withdrawal of plea hearing, counsel never objected to the “illegal void” sentence. Appellant asserts that “but for” counsel’s actions, Appellant would have never agreed to the plea but would have chosen to proceed to jury trial. Appellant concludes that counsel’s failure to represent him or speak on his behalf caused him manifest injustice.

{¶12} “ ‘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 that judgment of conviction, or on an appeal from that judgment.’ ” (Emphasis sic.) *State v. Gannon*, 4th Dist. Lawrence No. 14CA16, 2015-Ohio-1573, ¶ 12. *State v. Szefcyk*, 77 Ohio St.3d 93, 95, 671 N.E.2d 233 (1996), quoting *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus; see also *State v. Davis*, 139 Ohio St.3d 122, 2014-Ohio-1615, 9 N.E.3d 1031, ¶ 28.

{¶13} Courts have repeatedly applied the doctrine of res judicata to Crim.R. 32.1 motions. *State v. Bryukhanova*, 6th Dist. Fulton No. F-10-002, 2010-Ohio-5504, ¶ 11. See also *Gannon, supra*, at ¶ 20; *State v. Madrigal*, 6th Dist. Lucas Nos. L-10-1142 and L-10-1143, 2011-Ohio-798, ¶ 16 (“It is well established * * *

that claims submitted in support of a Crim.R. 32.1 motion to withdraw plea that could have been raised on direct appeal, but were not raised on direct appeal, are barred by res judicata”). In addition, when a defendant pleads guilty, he waives all claims of ineffective assistance of counsel, except to the extent that counsel's performance caused an unknowing and involuntary plea. *State v. Brown*, 4th Dist. Highland No. 07CA2, 2007-Ohio-5008, at ¶ 16. *State v. Persons*, 4th Dist. Meigs No. 02CA6, 2003-Ohio-4213, ¶ 11. The ineffective assistance of trial counsel claims that Appellant cites in support of his motion to withdraw his plea could have been raised in his direct appeal.

{¶14} In *Frazier I*, Appellant argued that his plea was not knowing, voluntary, and intelligent because he was not notified of the maximum penalties. Appellant's direct appeal raised the issue of the voluntariness of his plea without including the argument he now makes, that he would not have entered a plea on the weapons' charge “but for” counsel's deficient representation. In *Frazier I*, this Court reviewed the record in its entirety and overruled the assignment of error regarding his plea.³ Had there been any issue with Appellant's plea, as relates to a constitutional violation, we would have addressed it sua sponte. Thus, the claims Appellant now asserts are barred by the doctrine of res judicata.

³ Furthermore, in the April 3, 2015 decision, the trial court held: “At the time of Defendant's plea, this Court fully inquired into Mr. Frazier's intentions to plead guilty and made a full explanation of his rights under the Constitution of the United States and under the Constitution of the laws of the State of Ohio. After a thorough review of Defendant's file, this Court finds no manifest injustice to warrant the withdrawal of the Defendant's guilty plea after the voluntary giving of such plea.” The hearing transcript reflects this finding.

{¶15} Further, in *Bryukhanova, supra*, the appellate court observed that even if res judicata did not apply, there was nothing in the record to suggest that trial counsel provided deficient representation or in any manner acted to appellant's prejudice. See *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). “In Ohio, a properly licensed attorney is presumed competent and the appellant bears the burden to establish counsel's ineffectiveness.” *Brown, supra*, at ¶12, quoting *State v. Wright*, 4th Dist. Washington No. 00CA39, 2001-Ohio-2473, citing *State v. Hamblin*, 37 Ohio St.3d 153, cert. den. (1988), 488 U.S. 975; *Vaughn v. Maxwell*, 2 Ohio St.2d 299 (1965). The Sixth District Appellate Court declined to find that the defendant had met her burden to prove manifest injustice. In the appealed entry in the case sub judice, the trial court wrote:

“In the current Motion, Defendant asserts that he did not receive the indictment for Case No. 2009-CR-134 until he was being held at the county jail on the second case, No. 242, on or about August 7, 2010. The record shows this is incorrect. Mr. Frazier was served the indictment for Case No. 134 at the time of his arrest on those charges on May 16, 2009. The court has a copy of the warrant and indictment on file with the signature of the arresting officer attesting that the Defendant was served with both the warrant and the indictment. * * * ”

{¶16} As in *Bryukhanova, supra*, we see nothing in the record to support a claim that trial counsels' representation was deficient or acted to Appellant's prejudice.

{¶17} For the foregoing reasons, we find Appellant did not meet his burden to establish that a manifest injustice will occur by allowing his plea on the

weapons' charge to stand. We further find the trial court did not abuse its discretion by overruling Appellant's motion to withdraw his previously entered plea. As such, we find no merit to Appellant's sole assignment of error. It is hereby overruled and the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. & Hoover, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.