[Cite as *State v. Mitchem*, 2020-Ohio-1080.]

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

STATE OF OHIO,	:	
	:	Case Nos. 19CA10
Plaintiff-Appellee,	:	19CA11
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
HERBERT MITCHEM,	:	
	:	
Defendant-Appellant.	:	

APPEARANCES:

Herbert Mitchem, Caldwell, Ohio, Pro Se Appellant.

Justin Lovett, Jackson County Prosecuting Attorney, and Paul David Knipp, Jackson County Assistant Prosecuting Attorney, Jackson, Ohio, for Appellee.

Smith, P. J.

{¶1} This is a consolidated appeal from the Jackson County Court of Common Pleas' denial of two post-conviction motions brought by Appellant Herbert Mitchem. On September 13, 2017, Appellant entered a guilty plea to operating a vehicle with a hidden compartment used to transport a controlled substance and aggravated possession of drugs. The trial court accepted his plea, entered convictions on the two charges, and sentenced him to eight years in prison followed by a five-year term of community control.

Appellant then filed a direct appeal of his convictions. On November 8, 2018, we overruled Appellant's assignments of error and affirmed the trial court.

{¶2} Nearly six months later, on May 6, 2019, Appellant filed a motion to vacate or set aside his conviction or sentence under R.C. 2953.21, and a motion to withdraw his guilty plea under Crim.R. 32.1. On July 5, 2019, the trial court denied both motions. Appellant timely appealed each of the denials, which we consolidated for our review.

{¶3} Appellant asserts two assignments of error—that he received ineffective assistance of counsel and that his guilty plea is void for lack of a factual basis. We overrule the first assignment of error because it is barred by the doctrine of res judicata. We overrule the second assignment of error because Appellant has not shown any constitutional violation in the trial court's acceptance of the plea or the manifest injustice required under Crim.R. 32.1 to withdraw a guilty plea after sentencing. Accordingly, we affirm the denial of both of Appellant's post-conviction motions.

BACKGROUND

{¶4} We discussed the background of this case in detail in our decision and judgment entry on Appellant's direct appeal. *See State v. Mitchem*, 4th Dist. Jackson No. 17CA10, 2018-Ohio-4589, *appeal not*

allowed, 155 Ohio St.3d 1455, 2019-Ohio-1759, 122 N.E.3d 216. Here, we summarize only the information relevant to this appeal.

{¶5} Appellant was indicted on charges of operating a vehicle with a hidden compartment used to transport a controlled substance; aggravated possession of drugs; aggravated trafficking in drugs; operating a vehicle while under the influence of alcohol, a drug of abuse, or a combination of them; and endangering children. The aggravated possession and aggravated trafficking charges included a major-drug-offender specification. At his arraignment, Appellant pleaded not guilty and was appointed counsel.

{¶6} He later moved to suppress his statements to a state trooper and evidence seized in a traffic stop. Before the hearing on the suppression motion, the State notified Appellant and the court of a plea offer. Under the proposed plea agreement, in exchange for Appellant's guilty plea to the charges of operating a vehicle with a hidden compartment used to transport a controlled substance and aggravated possession of drugs, the State would dismiss the major-drug-offender specification for the latter charge and dismiss the remaining charges. Appellant declined the plea offer, after which the State stipulated that it would remain open until the first witness was sworn in to testify at the suppression hearing.

{¶7} At the hearing on the suppression motion, Appellant was advised that the State intended to supplement its discovery with recorded jail phone calls containing incriminating statements by Appellant. After discussing this development with counsel, Appellant informed the trial court that he wanted to accept the State's plea offer.

{¶8} The trial court conducted a Crim.R. 11(C) colloquy with Appellant. Appellant signed a written "ENTRY OF GUILTY PLEA" stating that he desired to withdraw his prior not-guilty plea and plead guilty to the charges of aggravated possession of drugs and operating a vehicle with a hidden compartment used to transport a controlled substance. During the colloquy and in the document that he submitted, Appellant represented that he understood the charges against him and that his guilty plea constituted a complete admission to them. The trial court also discussed, and Appellant acknowledged understanding, the maximum penalties involved for the charges and that his prison term for aggravated drug possession would be mandatory, without opportunity for judicial release. After completing its colloquy, the trial court accepted Appellant's guilty plea. *See Mitchem*, 2018-Ohio-4589, at ¶¶ 10-14.

{¶9} Appellant was sentenced to a mandatory eight-year prison term on his conviction for aggravated drug possession and a five-year term of

community control thereafter on his conviction for operating a vehicle with a hidden compartment used to transport a controlled substance.

{¶10} We granted Appellant's motion for leave to file a delayed appeal, in which he asserted two assignments of error. First, he contended that his plea was not a knowing, intelligent and voluntary decision. Second, he contended that his trial counsel rendered constitutionally ineffective assistance. We found that the trial court did not err in convicting Appellant upon his guilty plea, overruled his assignments of error and affirmed his convictions.

{¶11} Appellant subsequently brought a motion to vacate or set aside his conviction or sentence under R.C. 2953.21 and a motion to withdraw his guilty plea under Crim.R. 32.1. The trial court denied both motions, and this is the subject of this consolidated appeal. Appellant specifically asserts the following two assignments of error for our review.

ASSIGNMENTS OF ERROR

"FIRST ASSIGNMENT OF ERROR: HERBERT MITCHEM RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF HIS RIGHT TO DUE PROCESS OF LAW UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION."

"SECOND ASSIGNMENT OF ERROR: HERBERT MITCHEM'S GUILTY PLEA IS *VOID* FOR A LACK OF A *FACTUAL BASIS*, AND THE TRIAL COURT ERRED BY NOT DETERMINING THAT A *FACTUAL BASIS* FOR THE PLEA EXISTED BEFORE EXCEPTING [SIC] IT, IN VIOLATION OF HIS RIGHT TO DUE PROCESS OF LAW

UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION."

LEGAL STANDARDS

{¶12} Appellant appeals the trial court's denial of two motions—one brought under R.C. 2953.21 and the other under Crim.R. 32.1. " '[A] trial court's decision granting or denying a postconviction relief petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion; a reviewing court should not overrule the trial court's finding on a petition for postconviction relief that is supported by competent and credible evidence.' " *State v. Smith*, 4th Dist. Scioto No. 16CA3774, 2017-Ohio-7659, ¶ 8, quoting *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58. "An abuse of discretion connotes more than a mere error of judgment; it implies that the court's attitude is arbitrary, unreasonable, or unconscionable." *State v. Ables*, 4th Dist. Pickaway No. 11CA22, 2012-Ohio-3377, ¶ 9; citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶13} Crim.R. 32.1 states: "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." A motion under 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.

{¶14} Appellant filed his Crim.R. 32.1 motion more than one-and-a-half years after he was sentenced. We have noted that "Crim.R. 32.1 requires a defendant making a post-sentence motion to withdraw a plea to demonstrate manifest injustice because it is designed to discourage a defendant from pleading guilty to test the weight of potential reprisal, and later withdraw the plea if the sentence was unexpectedly severe." *Ables* at ¶ 10 (internal quotes omitted); quoting *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, 906 N.E.2d 422, ¶ 9; quoting *State v. Caraballo*, 17 Ohio St.3d 66, 67, 477 N.E.2d 627 (1985). "A manifest injustice comprehends a fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the resulting prejudice through another form of application reasonably available to him or her." *State v. Current*, 2nd Dist. Champaign No. 2010 CA 31, 2012-Ohio-1851, ¶ 7.

FIRST ASSIGNMENT OF ERROR

{¶15} In his first assignment of error, Appellant contends that his trial counsel provided ineffective assistance because he failed to investigate or

pursue mitigating evidence. He specifically asserts that, had his counsel pursued such evidence, he would have found there was no "hidden compartment" in the truck operated by Appellant. As argued by the State, however, Appellant cannot prevail on this ineffective-assistance-of-counsel argument because it could have been made in the direct appeal of his conviction.

{¶16} "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 or conviction, *or on an appeal from that judgment*." *State v. Cole*, 2 Ohio St.3d 112, 113, 443 N.E.2d 169, 171 (1982) (emphasis in original), *quoting State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), ¶ 9 of the syllabus. In *Cole*, the Supreme Court of Ohio held the doctrine of res judicata is a proper basis upon which to deny a motion for postconviction relief under R.C. 2953.21, where the defendant could have raised his ineffective-assistance-of-counsel argument on direct appeal. *Cole*, 2 Ohio St.3d at 114. We, along with other districts, have held that a defendant also cannot establish the manifest injustice required under Crim.R. 32.1 to

withdraw a plea where he could have sought redress for the alleged error through another application reasonably available to him. *See State v. Ables*, 4th Dist. Pickaway No. 11CA22, 2012-Ohio-3377, ¶ 12; *State v. Current*, 2nd Dist. Champaign No. 2010 CA 31, 2012-Ohio-1851, ¶ 7.

{¶17} Appellant does not claim that new evidence regarding his counsel's performance has emerged that was not available when he filed his direct appeal. In addition, Appellant was represented by new counsel in his direct appeal. He therefore cannot argue that he was enjoined from making his ineffective-assistance-of-counsel argument because he had the same counsel on appeal. *See id.* In fact, Appellant raised an ineffective-assistance-of-counsel argument in his direct appeal, albeit on different grounds. *See Mitchem*, 2018-Ohio-4589 at ¶ 28 (discussing Appellant's claim that his counsel provided ineffective assistance "by forcing him to plead guilty"). As we see no reason why Appellant could not have made his new ineffective-assistance-of-counsel argument in his direct appeal, and Appellant has not argued otherwise, his first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶18} In his second assignment of error, Appellant contends that his guilty plea is void because the trial court failed to establish a factual basis

for the plea before accepting it. The State argues that Appellant is merely rehashing the contention in his direct appeal—which we rejected—that his plea was not knowing, intelligent and voluntary. Indeed, the majority of our decision and entry on Appellant's direct appeal addressed the trial court's compliance with Crim.R. 11(C) before accepting his plea. And, as discussed above, Appellant cannot show the manifest injustice required under Crim.R. 32.1 by belatedly asserting an error that could have been raised in his direct appeal. Appellant does not argue that he could not have made this argument regarding the factual basis for his plea in his direct appeal. This assignment of error therefore may be overruled on that ground.

{¶19} In addition, Appellant relies upon a requirement binding on federal courts under the Federal Rules of Criminal Procedure, not a requirement binding on Ohio courts. Federal Rule of Criminal Procedure 11(b)(3) contains the requirement that, "[b]efore entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea." Under Ohio Crim.R. 11, however, when a defendant enters a plea of guilty, the plea "is a complete admission of the defendant's guilt." Crim.R. 11(b)(1). The trial court does not have any additional obligation to determine whether there is a factual basis for the plea under Crim.R. 11, unless the defendant has taken a so-called "Alford" plea. *See*, *e.g.*, *State v.*

Dyer, 6th Dist. Lucas No. L-17-1258, 2019-Ohio-1558, ¶ 8 (court must consider the factual record to determine if there is strong factual evidence of guilt and the plea was a rational decision before accepting an Alford guilty plea, which "is a waiver of a right to trial and consent to the conviction of guilty with a protestation of innocence"); citing, among others, *North Carolina v. Alford*, 400 U.S. 25, 38, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970); *State v. Bryant*, 6th Dist. Lucas No. L-03-1359, 2005-Ohio-3352, ¶ 9.

{¶20} Here, the trial court went to great lengths to confirm that Appellant understood the charges against him and that he was pleading guilty to those charges without any protestation of innocence. *See Mitchem*, 2018-Ohio-4589 at ¶ 13. As such, the court did not have an obligation to inquire further into the factual basis for the plea. Appellant admitted to committing the offenses as charged. This is another reason why Appellant has failed to show any manifest injustice or constitutional violation in the trial court's acceptance of his plea. *See State v. Damron*, 2010-Ohio-6459, ¶ 11 ("Postconviction relief is available only for errors of constitutional-dimension, i.e., errors that effectively deprived the trial court of jurisdiction to convict the defendant."); citing *State v. Perry*, 10 Ohio St.2d 175, 178-179, 226 N.E.2d 104 (1967); *State v. Powell*, 90 Ohio App.3d 260, 264, 629

N.E.2d 13 (1993); Katz and Gianelli, *Ohio Criminal Law* (2007), Section 81:2.

{¶21} In conclusion, we overrule Appellant's first assignment of error as barred by the doctrine of res judicata. Appellant's second assignment of error is overruled because he has not shown any manifest injustice or constitutional violation requiring withdrawal of his guilty plea. Accordingly, we affirm the trial court's denial of Appellant's motion to vacate or set aside his conviction or sentence and motion to withdraw his guilty plea.

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 Jackson 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. & Hess, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Jason P. Smith
Presiding 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.