

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

| | | |
|---------------------|---|------------------------|
| STATE OF OHIO | : | JUDGES: |
| | : | Julie A. Edwards, P.J. |
| | : | William B. Hoffman, J. |
| Plaintiff-Appellee | : | John W. Wise, J. |
| | : | |
| -vs- | : | Case No. 10-CA-15 |
| | : | |
| | : | |
| JOHN E. YOUNG | : | <u>OPINION</u> |
| | : | |
| Defendant-Appellant | : | |

| | |
|--------------------------|--|
| CHARACTER OF PROCEEDING: | Criminal Appeal from Fairfield County Court of Common Pleas Case No. 08 CR 295 |
|--------------------------|--|

| | |
|-----------|----------|
| JUDGMENT: | Affirmed |
|-----------|----------|

| | |
|-------------------------|------------------|
| DATE OF JUDGMENT ENTRY: | January 18, 2011 |
|-------------------------|------------------|

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

GREGG MARX
Assistant Prosecuting Attorney
Fairfield County, Ohio
201 S. Broad Street, Suite #400
Lancaster, Ohio 43130

DAVID A. SAMS
P.O. Box 40
West Jefferson, Ohio 43162

Edwards, P.J.

{¶1} Appellant, John Young, appeals a judgment of the Fairfield County Common Pleas Court overruling his motion to withdraw his plea of guilty to felonious assault (R.C. 2903.11(A)(2)), robbery (R.C. 2911.02), burglary (R.C. 2911.12(A)(1)) and kidnapping (R.C. 2905.01(A)(2)). Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} On August 8, 2008, appellant entered a bar in Fairfield County before the bar was open to the public for business. He severely beat the female employee at the bar, cut her with a knife and stole items from the bar. On August 22, 2008, he was indicted by the Fairfield County Grand Jury with one count of attempted aggravated murder, one count of attempted murder, two counts of felonious assault, two counts of aggravated robbery, one count of aggravated burglary and one count of kidnapping.

{¶3} Appellant entered into a plea agreement with the State of Ohio. The State amended the charge of aggravated burglary to burglary and the charge of aggravated robbery to robbery. Appellant then pleaded guilty to one count of felonious assault, one count of robbery, one count of burglary and one count of kidnapping. The case proceeded to a contested sentencing hearing. At the hearing, the State recommended a term of incarceration of 25 years. The court found that kidnapping and robbery merged as allied offenses of similar import, and sentenced appellant to an aggregate term of incarceration of 22 years. The court then found that as to the burglary conviction, a community control sanction would adequately punish appellant and protect the public and accordingly sentenced appellant to five years community control, and the court reduced his aggregate term of incarceration to 16 years.

{¶4} On September 8, 2009, appellant filed a pro se motion to withdraw his guilty plea. Attached to his motion was an affidavit claiming that his attorney told him the maximum sentence would be seven years, and he not only is serving 16 years, but has five years of community control sanctions to serve following his release from prison. Counsel for appellant later filed a memorandum in support of the motion, arguing that his plea was not knowing, intelligent and voluntary, a “voir dire” hearing should have been held on the issue of consecutive sentencing, and counsel was ineffective for misrepresenting to appellant that he would not receive more than a seven year sentence.

{¶5} The claim of ineffective assistance of counsel proceeded to an evidentiary hearing. At the hearing, appellant’s friend Gerry Nafzger testified that he was present when appellant’s attorney stated that appellant could get out of jail early if he behaved. Appellant’s sister testified that appellant’s attorney told him if he entered a plea, he would get seven years, or at least less than ten. Appellant testified that he was hoping for less than 10 years so he could get judicial release after five years. He then testified that his attorney never discussed judicial release with him and he believed he’d be eligible, and was never informed that if he received a sentence exceeding 10 years he was ineligible. He also conceded that he was aware prior to his plea that the state was seeking a sentence of 25 years, but he was hoping for less.

{¶6} The court found that appellant’s claims that his attorney promised him seven years and that he only entered the plea believing he was eligible for judicial release were not credible, and found appellant did not demonstrate manifest injustice.

The court overruled the motion to withdraw appellant's plea. Appellant assigns four errors on appeal:

{¶7} "I. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS AND TWICE PLACED IN JEOPARDY BY THE IMPOSITION OF CONSECUTIVE PRISON TERMS FOR THE SAME OFFENSE IN VIOLATION OF ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

{¶8} "II. THE DEFENDANT-APPELLANT'S PLEA WAS UNKNOWING, UNINTELLIGENT AND INVOLUNTARY IN VIOLATION OF ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

{¶9} "III. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS AND THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

{¶10} "IV. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE TRIAL COURT DID NOT ALLOW HIM TO WITHDRAW HIS PLEA GIVEN THE EXISTENCE OF MANIFEST INJUSTICE."

I

{¶11} In his first assignment of error, appellant argues that the court erred in sentencing him consecutively for aggravated robbery and felonious assault because the

convictions are allied offenses of similar import. Appellant asks this Court to merge his sentences.

{¶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 appeal from that judgment. *State v. Perry* (1967), 10 Ohio St.2d 175, para. 9 of the syllabus, 226 N.E.2d 104.

{¶13} The instant appeal is taken from the judgment overruling appellant's motion to withdraw his plea, and is not timely as to a direct appeal of appellant's 2009 sentencing entry. Appellant's claim, that consecutive sentencing was improper, could have been raised on direct appeal and is now barred by *res judicata*.

{¶14} The first assignment of error is overruled.

II

{¶15} In his second assignment of error, appellant argues his plea was not knowing, intelligent and voluntary because the court did not explain that a jury verdict must be unanimous, that he had the right to testify in his own defense, that he was subject to a period of mandatory postrelease control and that he was ineligible for judicial release if sentenced to more than ten years incarceration.

{¶16} Crim. R. 32.1 governs the withdrawal of a guilty or no contest plea and 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."

Because appellant's request was made post-sentence, the standard by which the motion was to be considered was "to correct manifest injustice." The accused has the burden of showing a manifest injustice warranting the withdrawal of a plea. *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph one of the syllabus. Further, a reviewing court will not disturb a trial court's decision whether to grant a motion to withdraw a plea absent an abuse of discretion. *State v. Caraballo* (1985), 17 Ohio St.3d 66, 477 N.E.2d 627. In order to find an abuse of discretion, the reviewing court must determine that the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶17} The doctrine of res judicata prohibits a defendant from raising claims in a Crim. R. 32.1 motion to withdraw a plea which were raised or could have been raised in prior proceedings. *State v. Kimbrough*, Licking App. No. 07-CA-44, 2008-Ohio-4363, ¶ 24, citing *State v. Young*, 4th Dist. No. 03CA782, 2004-Ohio-2711. Appellant now argues that the transcript of the plea hearing demonstrates that his plea was not voluntary because he did not understand all of the rights he was waiving and the possible penalties, a claim which could have been raised on direct appeal. Appellant's claim is therefore barred by res judicata.

{¶18} Further, the transcript of the plea hearing reflects that appellant was informed of the mandatory period of postrelease control, and the judgment entry of sentence reflects the term of postrelease control and that appellant had been advised of postrelease control. Jury unanimity need not be explained to the defendant in a plea colloquy. E.g., *State v. Kirkpatrick*, 102 Ohio St.3d 321, 810 N.E.2d 927, 2004-Ohio-3167. This Court has previously held that a defendant need not be informed of his

ineligibility for judicial release. E.g., *State v. Smith*, Muskingum App. No. CT2007-0073, 2008-Ohio-3306; *State v. Cuthbert*, Fairfield App. No. 08 CA 75, 2009-Ohio-4856.

{¶19} The second assignment of error is overruled.

III

{¶20} In his third assignment of error, appellant argues counsel was ineffective for failing to inform him that he could be given consecutive sentences for aggravated robbery and felonious assault, that he could not be convicted except by unanimous jury, that he had a right to testify in his own defense, that five years of postrelease control was mandatory and that he could be rendered ineligible for judicial release.

{¶21} Appellant presented no evidence at the hearing concerning counsel's failure to inform him about the possibility of consecutive sentencing, jury unanimity, his right to testify in his own defense and the mandatory term of postrelease control. The only evidence presented to the court concerned counsel's representation to appellant that he would only receive seven years and his failure to inform appellant that he would not be eligible for judicial release if he received more than ten years.

{¶22} A properly licensed attorney is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 524 N.E.2d 476. Therefore, in order to prevail on a claim of ineffective assistance of counsel, appellant must show counsel's performance fell below an objective standard of reasonable representation and but for counsel's error, the result of the proceedings would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136. In other words, appellant must show that counsel's conduct so undermined the

proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Id.

{¶23} The trial court found that appellant failed to present credible evidence in support of his claims that his attorney made material misrepresentations to him concerning sentence. We agree. Despite appellant's testimony that counsel told him he would only get seven years, he admitted at the hearing that he knew before he entered the plea that the state was seeking a 25-year sentence. Tr. 35, 36. Further, it is apparent from the transcript of the contested sentencing hearing that the state never agreed to a seven year sentence and was seeking 25 years throughout the proceedings.

{¶24} While appellant testified that his attorney never discussed judicial release with him and he had no idea that he would be ineligible if he received a sentence exceeding ten years, he also testified that he knew if the sentence was under 10 years he would be eligible for release after five:

{¶25} "Q. Okay. So let's talk about the discussions between you and your attorney before you entered the plea. Did you have discussions with Mr. Cooper concerning a likelihood or range of sentences prior to entering the plea?

{¶26} "A. Yes.

{¶27} "Q. Okay. And what did he tell you about the likelihood of a sentence in this case?

{¶28} "A. We were hoping for seven and less than ten, so that - - go ahead.

{¶29} "Q. Go ahead and explain further if you want.

{¶30} “A. So that way, below ten, I can try to get judicial release after five.” Tr. 31.

{¶31} The court did not abuse its discretion in overruling appellant’s motion based on the claim of ineffective assistance of counsel. The third assignment of error is overruled.

IV

{¶32} Appellant argues that for the reasons stated in his first three assignments of error, he demonstrated a manifest injustice and the court erred in failing to allow him to withdraw his plea. Based on our rulings in assignments of error one through three, the fourth assignment of error is overruled.

{¶33} The judgment of the Fairfield County Common Pleas Court is affirmed.

By: Edwards, P.J.

Hoffman, J. and

Wise, J. concur

JUDGES

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

JOHN E. YOUNG

Defendant-Appellant

:
:
:
:
:
:
:
:
:
:
:
:

JUDGMENT ENTRY

CASE NO. 10-CA-15

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Fairfield County Court of Common Pleas is affirmed. Costs assessed to appellant.

JUDGES