[Cite as *State v. Lightfoot*, 2016-Ohio-7755.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff - Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
COLT C. LIGHTFOOT	:	Case No. CT2016-0043
	:	Case No. CT2016-0044
Defendant - Appellant	:	
	:	
	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Muskingum County Court of Common Pleas, Case Nos. CR2012-0086 and CR2012-0122

JUDGMENT: Affirmed

DATE OF JUDGMENT: November 4, 2016

APPEARANCES:

For Plaintiff-Appellee

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Muskingum County Prosecutor

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Baldwin, J.

{¶1} Defendant-appellant Colt Lightfoot appeals from the July 21, 2016 Decision of the Muskingum County Court of Common Pleas denying his Motion to Withdraw Guilty Plea Post-Sentence. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On April 19, 2012, the Muskingum County Grand Jury indicted appellant in Case No. CR2012-0086 on four counts of breaking and entering in violation of R.C. 2911.13(A), felonies of the fifth degree, two counts of theft (motor vehicle) in violation of R.C. 2913.02(A)(1), felonies of the fourth degree, two counts of theft ($7,500-$150,000) in violation of R.C. 2913.02(A)(1), felonies of the fourth degree, and two counts of theft (firearms) in violation of R.C. 2913.02(A)(1), felonies of the third degree. Appellant also was indicted on one count each of tampering with evidence in violation of R.C. 2921.12(A)(1), a felony of the third degree, burglary in violation of R.C. 2911.12(A)(2), a felony of the second degree, theft ($1,000-$7,500) in violation of R.C. 2913.02(A)(1), a felony of the fifth degree, and engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1), a felony of the first degree. At his arraignment on April 25, 2012, appellant entered a plea of not guilty to the charges in Case No. CR2012-0086.

{¶3} On May 18, 2012, appellant was indicted in Case No. CR2012—0122 on two counts of assault on a corrections officer in violation of R.C. 2903.13(A), felonies of the fifth degree. At his arraignment on May 23, 2012, appellant entered a plea of not guilty to the charges.

{¶4} Subsequently, on June 6, 2012, appellant withdrew his former not guilty plea in Case No. CR2012-0086 and pleaded guilty to one count of theft (motor vehicle), two counts of theft (firearms), and one count of tampering with evidence. The remaining charges were dismissed. As memorialized in an Entry filed in Case No. CR2012-0086 on July 18, 2012, appellant was sentenced to an aggregate prison sentence of seven years.

{¶5} On June 6, 2012, appellant also withdrew his plea of not guilty in Case No. CR2012-0122 and pleaded guilty to both counts of assault on a corrections officer. Pursuant to an Entry filed on July 18, 2012 in Case No. CR2012-0122, appellant was sentenced to an aggregate prison sentence of one year. In both cases, the trial court ordered that the sentences imposed in Case Nos. CR2012-0086 and CR2012-0122 be served consecutively to one another, for an aggregate prison sentence of eight years. Appellant did not file a direct appeal.

{¶6} Thereafter, on July 7, 2016 appellant filed a Motion to Withdraw Guilty Pleas Post-Sentence. The motion was filed in both cases. Appellant, in his motion, alleged that the trial court did not sentence him to the recommended six year prison sentence and that, therefore, his plea was entered into unintelligently and unknowingly and that he was denied effective assistance of trial counsel who allowed appellant "to enter a plea agreement that counsel knew could be breached." Appellee filed an opposition to the same on July 12, 2016.

{¶7} As memorialized in a Decision filed in Case Nos. CR2012-0086 and CR2012-0122 on July 21, 2016, the trial court denied appellant's motion. The trial court, in its Decision, stated that it was clear from the record that appellant had been advised,

both orally and in writing, that the trial court was not bound by the recommendation of the Prosecutor.

{¶8} Appellant now appeals from the trial court's July 21, 2016 Decision, raising the following assignment of error on appeal:

{¶9} THE TRIAL COURT ERRED IN FAILING TO SANCTION DEFENDANT-APPELLANT THE OPPORTUNITY TO WITHDRAW THE PREVIOUSLY ILL ADVISED PLEA OF GUILTY.

I

{¶10} Appellant, in his sole assignment of error, argues that the trial court erred in denying his motion seeking to withdraw his guilty plea after sentencing. We disagree.

{¶11} Crim.R. 32.1 states as follows: "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." Our review of a trial court's decision under Crim.R. 32.1 is limited to a determination of whether the trial court abused its discretion. *State v. Caraballo*, 17 Ohio St.3d 66, 477 N.E.2d 627 (1985). In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶12} Appellant, in his motion, argued that he should be permitted to withdraw his guilty plea because the trial court did not sentence him to the recommended six year prison sentence and that, therefore, his plea was entered into unintelligently and unknowingly. Appellant also asserted that he was denied effective assistance of trial

counsel who allowed appellant "to enter a plea agreement that counsel knew could be breached."

{¶13} We find that appellant's claims are barred by the doctrine of res judicata. Under the doctrine of res judicata, a final judgment 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 the defendant raised or could have raised at trial or on appeal. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus (1967). More specifically, a criminal defendant cannot raise any issue in a postsentence motion to withdraw a guilty plea that was or could have been raised at trial or on direct appeal. *State v. Wyrick*, 5th Dist. Fairfield No. 01CA17, 2001 WL 1025811 (Aug. 31, 2001).

{¶14} In the case sub judice, appellant was sentenced on July 16, 2012. Thus, appellant was aware at such time that he did not receive the six year sentence that he believed that he would receive. Appellant could have raised such issue on direct appeal, but did not do so.

{¶15} Moreover, under the current state of the law, a trial court is not bound by the state's negotiated plea agreement with a defendant. *State v. Powell*, 5th Dist. Musk. No. CT2013-0045, 2014-Ohio-1653. The June 6, 2012 written plea agreements in Case No. CR2012-0086 and CR2012-0122 both state, in relevant part, as follows: The Defendant acknowledges that the parties have engaged in plea negotiations and he accepts and agrees to be bound by the following agreement, which is the product of such negotiations…The Defendant further acknowledges that he understands the Prosecutor's

Office's recommendation does not have to be followed by the Court." The recommendation was an aggregate prison sentence of six years.

{¶16} No transcript of either of the plea hearings was filed by appellant for our review. App.R. 9. Absent the transcript, we are unable to review the exchange between the trial court and appellant. In *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980), the Supreme Court of Ohio held the following:

> The duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record. See *State v. Skaggs* (1978), 53 Ohio St.2d 162. This principle is recognized in App.R. 9(B), which provides, in part, that ' * * *the appellant shall in writing order from the reporter a complete transcript or a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record.* * *.' When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm. (Footnote omitted.)

{¶17} From appellant's own signed plea agreements, we find that appellant was aware that he was not guaranteed a six year sentence and that the State's recommendation memorialized in the guilty plea agreement did not bind the trial court.

{¶18} Based on the foregoing, we find that the trial court did not abuse its discretion in denying appellant's Motion to Withdraw Guilty Plea Post-Sentence.

{¶19} Appellant's sole assignment of error is, therefore, overruled.

{¶20} Accordingly, the judgment of the Muskingum County Court of Common Pleas is affirmed.

By: Baldwin, J.

Hoffman, P.J. and

Delaney, J. concur.