

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio

Court of Appeals No. S-10-018

Appellee

Trial Court No. 08 CR 203

v.

Daniel A. Elkins

DECISION AND JUDGMENT

Appellant

Decided: October 22, 2010

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,
and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Daniel A. Elkins, pro se.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This accelerated appeal is before the court following the March 18, 2010 judgment of the Sandusky County Court of Common Pleas denying defendant-appellant's motion to withdraw his guilty plea. For the reasons that follow, we affirm the trial court's judgment.

{¶ 2} Appellant was indicted on several counts stemming from a December 31, 2007 aggravated robbery in Ballville Township, Sandusky County, Ohio. On May 14, 2008, the day of trial, appellant entered a guilty plea to three counts of complicity to commit aggravated robbery, in violation of R.C. 2911.01(A)(1) and 2923.03. Thereafter, appellant was sentenced to eight years of imprisonment as to each count, to be served consecutively. On direct appeal, this court affirmed appellant's conviction and sentence. See *State v. Elkins*, 6th Dist. No. S-08-014, 2009-Ohio-2602.

{¶ 3} On December 10, 2009, appellant filed a motion to withdraw his guilty plea pursuant to Crim.R. 32.1. In his motion, appellant argued that because the trial court failed to properly notify him of the mandatory five year period of postrelease control, his plea was not knowing and voluntary and was, therefore, void. Further, that because appellant's sentence is void, his motion should be considered a presentence motion to withdraw his plea. The state opposed the motion and argued that the court lacked jurisdiction to rule on the motion following this court's decision on appellant's direct appeal. On March 18, 2010, the trial court, without explanation, denied appellant's motion. This appeal followed.

{¶ 4} Appellant, pro se, now raises the following two assignments of error for our review:

{¶ 5} "First Assignment of Error: The trial court committed reversible and prejudicial error in denying appellant's motion to withdraw his guilty pleas pursuant to Ohio Rule of Criminal Procedure 32.1.

{¶ 6} "Second Assignment of Error: The trial court committed reversible error in denying appellant's motion to withdraw his guilty pleas without an evidentiary hearing."

{¶ 7} Appellant's assignments of error are related and will be jointly addressed. Appellant argues that his guilty plea was not knowing and voluntary because he was not notified that part of his sentence included a mandatory five year term of postrelease control.

{¶ 8} To uphold a guilty plea, there must be substantial compliance with the Crim.R. 11(C)(2)(a) requirement to disclose the maximum penalties. *State v. Nero* (1990), 56 Ohio St.3d 106, 108. "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *Id.*, citing *State v. Stewart* (1977), 51 Ohio St.2d 86.

{¶ 9} A motion to withdraw a guilty plea "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." Crim.R. 32.1. However, where the defendant has been given a void sentence, a motion to withdraw a guilty plea must be considered a presentence motion under Crim.R. 32.1. *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, syllabus.

{¶ 10} Following the Supreme Court of Ohio's decision in *Boswell*, the court addressed the effect of newly enacted R.C. 2929.191. In *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, the court held that sentences imposed after the July 11, 2006 effective date where the trial court failed to impose postrelease control, the court was to

follow the remedial procedures set forth in the statute. Such remedial procedures include a hearing limited to the imposition of postrelease control and a corrected judgment entry. Id at ¶ 24.

{¶ 11} In *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, the Supreme Court of Ohio examined the effect of the improper postrelease control notification on a postsentence motion to withdraw a guilty plea. The court concluded that because the defendant was sentenced after July 11, 2006, his sentence was not void and, thus, his motion to withdraw his guilty plea was properly denied. Id. at ¶ 66. The court further agreed that because the issue of whether his guilty plea was knowing and voluntary had previously been addressed, the claims were properly denied on the basis of res judicata. Id. at ¶ 63.

{¶ 12} In the present case, on May 14, 2008, the morning of the scheduled jury trial, appellant decided to enter a plea. As to postrelease control, the trial court stated:

{¶ 13} "[I]f I impose a prison term, you will be subject to a period of post-release control for up to five years after you're released from imprisonment. If you violate post-release control, you can be subject to additional time of post-release control up to a maximum of one-half of the original sentence. If the new violation is a felony, you can be required to serve imprisonment of the greater of one year or the time remaining on post-release control and that sentence may run consecutive to the sentence for a new felony."

{¶ 14} Appellant was then informed of his limited appeal rights. Appellant conferred with his attorney and decided to proceed with the jury trial. Following voir dire, appellant again decided to enter a guilty plea. Appellant affirmatively stated that he recalled the earlier discussion regarding the waiver of his constitutional rights; those were again stated on the record. Appellant was reminded of the maximum prison sentence for each of the three counts and that they could be imposed consecutively. Appellant was not re-notified of the mandatory term of postrelease control. Appellant was immediately sentenced following his plea.

{¶ 15} The court's May 14, 2008 judgment entry provided:

{¶ 16} "The Court advised the defendant that when he is released from prison the Parole Board will impose post release control for a period of five years, and that any violation of the conditions of post release control may, at the option of the Parole Board, result in the imposition of a residential sanction, which may include a new prison term of up to one-half of the stated prison sentence imposed."

{¶ 17} Upon review, we agree with the state's argument that appellant's motion to withdraw his guilty plea was barred by res judicata. Because appellant was sentenced after July 11, 2006, he has failed to demonstrate that his sentence is void. (Void sentences are not barred by res judicata. See *State v. Greenleaf*, 9th Dist. No. 24983, 2010-Ohio-2863, ¶ 13.) Res judicata bars the assertion of claims from a valid, final judgment of conviction that were raised or could have been raised on direct appeal. *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph one of the syllabus. See, also, *State ex rel.*

Special Prosecutors v. Judges of Belmont Cty. Ct. of Common Pleas (1978), 55 Ohio St.2d 94; *State v. Smith*, 8th Dist. No. 94063, 2010-Ohio-3512. Further, this court did address whether appellant's guilty plea was knowing and voluntary and whether the trial court substantially complied with Crim.R. 11. *Elkins*, supra, at ¶ 32-36.

{¶ 18} Alternatively, even considering the merits of appellant's appeal we find his argument unpersuasive. First, as set forth above appellant has failed to demonstrate that his sentence is void. Thus, his motion to withdraw his guilty plea must be treated as a postsentence motion and appellant must demonstrate that a manifest injustice occurred. See Crim.R. 32.1 and *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus. "'Manifest injustice' relates to some fundamental flaw in the proceedings which results in a miscarriage of justice or is inconsistent with the demands of due process." *State v. Ruby*, 9th Dist. No. 23219, 2007-Ohio-244, ¶ 11.

{¶ 19} Further, because a motion to withdraw a guilty plea is addressed to the sound discretion of the trial court, we reverse the trial court's decision on such a motion only when the trial court has abused its discretion. *Smith*, 49 Ohio St.2d at 264. An abuse of discretion is found only when it is determined that a trial court's attitude in reaching its judgment was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 217

{¶ 20} In his motion to withdraw his guilty plea appellant specifically argued that the trial court "never properly advised Affiant of the 'mandatory' five (5) year term of postrelease control." In his brief, appellant further claims that the court erroneously stated that it "may" impose postrelease control for a period of five years.

{¶ 21} As quoted above, the trial court did state that, upon release from prison, appellant would be subject to post-release control. The court did erroneously state that instead of a mandatory five-year term as required under R.C. 2967.28(B), appellant would be subject to postrelease control for "up to" five years. The May 14, 2008 judgment entry contains the proper notification.

{¶ 22} In *State v. Wright*, 6th Dist. No. S-09-023, 2010-Ohio-2620, this court examined the effect of a deficient postrelease control notification on a postsentence request to withdraw a guilty plea. In *Wright*, the defendant was sentenced in 2009, following a guilty plea to complicity to robbery; the defendant was notified that she "may be subjected to a period of postrelease control for up to three years upon your release from prison * * *." *Id.* at ¶ 11. This court relied on the Supreme Court of Ohio's decision in *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, where the trial court failed to mention postrelease control, and the distinction it drew with *Watkins v. Collins*, 111 Ohio St.3d 425, 2006-Ohio-5082, where the court did mention postrelease control, thus implicating the substantial compliance test analysis. *Id.* at ¶ 26. We held:

{¶ 23} "The trial court's imperfect advisement to appellant that she was subject to a discretionary period of postrelease control afforded her sufficient notice that such control might be imposed. Since appellant had notice that her sentence might include postrelease control, she cannot show prejudice as her plea was made with knowledge of that possibility." (Citations omitted.) *Id.* at ¶ 29.

{¶ 24} In the present case, appellant was notified that postrelease control was mandatory. Although the court suggested that the five-year term was discretionary, appellant was clearly notified of the maximum sentence he was facing by entering the guilty plea. Accordingly, we find that the trial court's denial of appellant's motion to withdraw his guilty plea did not create a manifest injustice.

{¶ 25} As to the trial court's failure to conduct a hearing, we note that a postsentence motion to withdraw a guilty plea is subject to denial without a hearing when the record indicates that the defendant is not entitled to relief and he has failed to submit evidentiary documents sufficient to demonstrate a manifest injustice. *State v. Never*, 6th Dist. No. L-08-1076, 2009-Ohio-1473, ¶ 75, citing *State v. Carter*, 2d Dist. No. 21694, 2007-Ohio-20, ¶ 24. We agree that the record demonstrates that appellant is not entitled to relief. Thus, the trial court did not err when it denied appellant's motion to withdraw his guilty plea without first conducting a hearing.

{¶ 26} Accordingly, we find that appellant's first and second assignments of error are not well-taken.

{¶ 27} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair proceeding and the judgment of the Sandusky County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.