

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

State of Ohio

Court of Appeals No. L-11-1151

Appellee

Trial Court No. CR0199506885

v.

Alfred Moore, Jr.

DECISION AND JUDGMENT

Appellant

Decided: October 12, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Robert P. Soto, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals the judgment of the Lucas County Court of Common Pleas, denying his motions to void his sentencing judgment and withdraw his guilty plea. Because we conclude that an entry correcting a non-substantive omission in a judgment

of conviction does not create a new right of appeal and the trial court properly denied appellant's motion to withdraw his guilty plea, we affirm.

{¶ 2} In the fall of 1995, two men impersonating police officers abducted, raped and robbed two women in the northern part of Toledo, Ohio. In the first instance, the men came upon a woman in a disabled car, identified themselves as police detectives and told the woman they would drive her to "headquarters." Instead, the men took the woman into Michigan where they raped and abandoned her. As they were leaving, they took the woman's engagement ring.

{¶ 3} A few weeks later, the men found a second victim. Again they drove the woman into Michigan where they raped and robbed her. This time they returned the woman to near where they had taken her.

{¶ 4} A third attempt led to the arrest of appellant, Alfred Moore, Jr., and his accomplice, Nicholas Boggs. The third victim recognized Boggs and was able to identify him to police. *State v. Moore*, 6th Dist. No. L-06-1337, 2008-Ohio-1288, ¶ 9-12. Boggs and appellant were arrested. Appellant was named in a multi-count indictment charging two counts of kidnapping, one count of rape, one count of felonious sexual penetration and two counts of robbery.

{¶ 5} On January 8, 1996, appellant pled guilty to two counts of kidnapping, one count of felonious sexual penetration and one count of robbery. The remaining charges were dismissed. The trial court accepted the plea, found appellant guilty and, following a presentence investigation, sentenced him to indeterminate terms of 10 to 25 years

imprisonment on each kidnapping charge, 10 to 25 years on the felonious sexual penetration charge and eight to 15 years imprisonment for the robbery. The court ordered these terms of incarceration be served consecutively. Of interest in this appeal, in the sentencing entry the court stated only that appellant had been convicted of the various offenses. The entry did not include the manner of conviction.

{¶ 6} Appellant did not file a direct appeal. Over the next few years, however, he did file multiple motions for various reliefs, all of which were unsuccessful. In 2006, appellant was determined to be a sexual predator pursuant to R.C. 2950.01(E). He appealed this determination arguing that (1) the trial court was without jurisdiction because appellant's sexual offense occurred in Michigan, (2) the kidnapping and felonious sexual penetration charges should have merged as allied offenses of similar import and (3) the sexual predator classification was not supported by clear and convincing evidence. We affirmed the sexual predator determination, *id.* at ¶ 37, but declined to consider the allied offenses argument because it was not raised in an original direct appeal. *Id.* at ¶ 14.

{¶ 7} On April 18, 2011, appellant moved to vacate his judgment of conviction, asserting that the omission of the manner of his conviction was inconsistent with Crim.R. 32(C), as interpreted in *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163. According to appellant, this inconsistency voided the conviction. At the same time, appellant moved to withdraw his guilty plea and have the motion treated as a pre-sentencing motion since the original judgment of conviction was void.

{¶ 8} Relying on this court's decision in *State v. Triplett*, 6th Dist. No. L-10-1158, 2011-Ohio-1713, the trial court denied appellant's motion to vacate his sentence and issued a nunc pro tunc entry correcting the omission of the manner of conviction. The court also denied appellant's motion to withdraw his plea, finding no manifest injustice in the acceptance of the plea. From this judgment, appellant now brings this appeal.

{¶ 9} Appellant sets forth the following two assignments of error:

I. The trial court committed reversible error by denying the defendant's motion to void judgment [sic] because the trial court did not issue a proper sentence or final appealable order in 1996.

II. The trial court committed reversible error when it denied defendant's motion to withdrawal [sic] guilty plea without a hearing and review as it as a post-conviction motion.

I. Void Judgment

{¶ 10} Appellant's first assignment of error is not well-taken. During the pendency of this matter the Supreme Court of Ohio clarified the effect of a judgment of conviction in which the trial court has omitted the manner of conviction. If the judgment contains "(1) the fact of the conviction, (2) the sentence, (3) the judge's signature, and (4) the time stamp indicating the entry upon the journal by the clerk," it is a final order subject to appeal. *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5404, 958 N.E.2d 142, paragraph one of the syllabus. To be in compliance with Crim.R. 32(C), the judgment should also contain the manner of conviction, *id.* at ¶ 9; *Baker, supra*, at ¶ 14, although

the lack of such information is not substantive, *Lester* at ¶ 11, and may be rectified by a nunc pro tunc entry. *Id.* at paragraph two of the syllabus. The entry of a nunc pro tunc entry does not engender a new final order from which appeal may be had. *Id.*

{¶ 11} Appellant's original judgment of conviction stated that he had been convicted of two counts of kidnapping, one count of felonious sexual penetration and one count of robbery. The entry recited the sentence imposed, was signed by the judge and time stamped by the clerk. The lack of a statement of the manner of conviction was corrected in a May 18, 2011 nunc pro tunc entry. The entry, as corrected, conforms with Crim.R. 32(C). No new right of appeal exists. Appellant is not entitled to a new sentencing hearing and any claims of error that were, or could have been, raised in his original appeal are barred by the doctrine of res judicata. *State v. Ishmail*, 67 Ohio St.2d 16, 18, 423 N.E.2d 1068 (1981).

II. Motion to Withdraw Guilty Plea

{¶ 12} In his second assignment of error, appellant complains that the trial court erred in denying his motion to withdraw his guilty plea. Appellant insists that the trial court used the wrong standard in weighing his motion; the motion should have been "freely and liberally granted," *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992), as a pre-sentencing motion because the original sentencing entry was void. The court improperly applied the post-sentencing standard, "to correct manifest injustice," Crim.R. 32.1, according to appellant.

{¶ 13} The state responds that the court should not have considered the motion to withdraw at all because it is barred by the doctrine of res judicata after a prior motion to withdraw the guilty plea was denied. On the merits, the state maintains the trial court applied the proper standard and the denial of the motion was within the court's discretion.

{¶ 14} As we have already noted, appellant's original judgment of conviction was not void. Consequently, his motion to withdraw his guilty plea is treated as a post-sentencing motion. On a post-sentencing motion to withdraw a plea, it is the burden of the movant to prove that withdrawal is necessary to correct manifest injustice. *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus. Absent an allegation of facts that would require withdrawal of the plea, no hearing is necessary. *State v. Wilkey*, 5th Dist. No. CT2005-0050, 2006-Ohio-3276, ¶ 25. A movant is barred by the doctrine of res judicata from again litigating issues which were, or could have been raised in a prior Crim.R. 32.1 motion.

{¶ 15} In this motion, appellant claims his plea was not knowingly and intelligently rendered because the trial court failed to inform him during the plea colloquy of the impact that the Ohio Adult Parole Authority would have on his sentence. This was an issue he could have raised on direct appeal, or at his first motion to withdraw his guilty plea on November 14, 1996. The issue is thus precluded from again being litigated. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 16} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

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.

Arlene Singer, P.J.

Thomas J. Osowik, J.
CONCUR.

JUDGE

JUDGE

JUDGE

<p>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.</p>
