[Cite as *State v. Rivera*, 2013-Ohio-1591.]

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

State of Ohio — Court of Appeals No. L-12-1040

Appellee — Trial Court No. CR0200502482

v.

Juan Rivera — **DECISION AND JUDGMENT**

Appellant — Decided: April 19, 2013

* * * * *

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

Charles S. Rowell, Jr., for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Juan Rivera, appellant, appeals a December 2, 2011 judgment of the Lucas County Court of Common Pleas. The judgment resentenced appellant with respect to postrelease control.

Case History

{¶ 2} On October 3, 2005, appellant entered *Alford* guilty pleas (pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)) to two counts of rape and two counts of gross sexual imposition. The rape counts charged violations of R.C. 2907.02(A)(1)(b), first degree felonies. The gross sexual imposition counts charged violations of R.C. 2907.05(A)(4), third degree felonies.

{¶ 3} The trial court conducted a sentencing hearing on November 2, 2005. The court's sentencing judgment was journalized on November 7, 2005. The court sentenced appellant to serve a one year prison term on both gross sexual imposition convictions with the sentences to run concurrently to each other and to the sentences for rape. The court sentenced appellant to a term of seven years imprisonment on both rape convictions, with the sentences ordered to run consecutively to each other. This resulted in a total aggregate sentence of imprisonment for 14 years.

{¶ 4} Appellant filed a direct appeal to this court and challenged the constitutionality of his sentencing. In *State v. Rivera,* 6th Dist. L-05-1356, 2006-Ohio-3185, we reversed and remanded for resentencing, based upon the Ohio Supreme Court's decision in *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

{¶ 5} On remand, the trial court conducted a resentencing hearing on August 30, 2006, and filed a resentencing judgment. The judgment was journalized on September 1, 2006. In the judgment, the trial court resentenced appellant to serve the identical term of

imprisonment that it imposed in 2005. Appellant did not appeal the September 1, 2006 judgment.

{¶ 6} On August 29, 2007, appellant filed a pro se "Motion to Vacate Voidable Sentence Civil Rule 60(B)." The motion challenged appellant's resentencing under *Foster* on constitutional grounds. In an October 19, 2007 judgment, the trial court denied the motion, holding that the motion constituted a petition for postconviction relief and was untimely under R.C. 2953.21.

{¶ 7} On May 21, 2009, appellant filed a motion to vacate judgment pursuant to Crim.R. 33(A)(1) and the Ohio Supreme Court decision of *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917. In a June 18, 2009 judgment, the trial court held that the motion constituted a second petition for postconviction relief and denied the petition.

Motion to Vacate Sentence on Postrelease Control Grounds and Crim.R. 32.1 Motion to Withdraw Guilty Plea

{¶ 8} On January 14, 2011, appellant filed a motion to vacate sentence. In the motion, appellant argued that the trial court failed to provide statutorily mandated notices of postrelease control at sentencing in 2005 and in the sentencing judgment. Appellant argued that the sentence was void. Appellant also argued that a de novo resentencing hearing was required. While the motion challenging sentencing on postrelease control grounds remained pending, appellant also filed a Crim.R. 32.1 motion to withdraw his guilty plea on February 8, 2011.

{¶ 9} In a September 22, 2011 judgment, the trial court ruled on both motions. The court denied the motion to withdraw appellant's guilty plea and granted appellant's request for a resentencing. The court ordered, however, pursuant to the Ohio Supreme Court's decision in *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, that the hearing would be limited to providing proper notice of postrelease control.

{¶ 10} The resentencing hearing proceeded on December 2, 2011. The trial court also filed its resentencing judgment on that date. Appellant filed a notice of appeal from the December 2, 2011 resentencing judgment. Appellant asserts one assignment of error on appeal:

> Assignment of Error No. 1: The trial court erred in accepting appellant's plea of guilty pursuant to North Carolina v. Alford.

{¶ 11} Under the sole assignment of error, appellant argues that his guilty plea is invalid because the trial court failed to make the necessary inquiry, before accepting his plea, pursuant to *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). As we agree with the state's contention that this issue is barred under the doctrine of res judicata, we affirm.

{¶ 12} We considered the nature of *Alford* pleas and the standard to judge their validity in *State v. Gonzalez*, 193 Ohio App.3d 385, 397, 2011-Ohio-1542, 952 N.E.2d 502, ¶ 59-60 (6th Dist.):

> A plea made pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162, is a type of guilty plea in which a defendant

pleads guilty while maintaining innocence. *State v. Ware*, 6th Dist. No. L-08-1050, 2008-Ohio-6944, 2008 WL 5412393, ¶ 11; *State v. Hopkins*, 6th Dist. No. L-05-1012, 2006-Ohio-967, 2006 WL 513956, ¶ 14. There is no "express admission of guilt" in an *Alford* plea. *Alford* at 37.

Validity of such a plea is judged by the standard of "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to defendant." *Alford* at 31; see *State v. Lacumsky*, 6th Dist. No. OT-08-060, 2009-Ohio-3214, 2009 WL 1875231, ¶ 7. In *State v. Piacella* (1971), 27 Ohio St.2d 92, 96, 56 O.O.2d 52, 271 N.E.2d 852, the Ohio Supreme Court considered an *Alford* plea and held that "where the record affirmatively discloses that: (1) a guilty plea was not the result of coercion, deception or intimidation; (2) counsel was present at the time of the plea; (3) his advice was competent in light of the circumstances surrounding the plea; (4) the plea was made with the understanding of the nature of the charges; and, (5) the plea was motivated either by a desire to seek a lesser penalty or a fear of the consequences of a jury trial, or both, the guilty plea has been voluntarily and intelligently made."

{¶ 13} Appellant argues that the trial court, before accepting the plea, failed to conduct the necessary inquiry to ascertain whether appellant's *Alford* plea was motivated either by a desire to seek a lesser penalty or by a fear of the consequences of a jury trial, or both. He also claims that the trial court failed to provide notice of the effect of the plea

or conduct an inquiry of the type outlined in the Ohio Supreme Court's decision in *State v. Piacella*.

{¶ 14} The doctrine of res judicata bars consideration of issues that were raised or could have been raised on direct appeal. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus; *State v. Bryukhanova*, 6th Dist. No. F-10-002, 2010-Ohio-5504, ¶ 12; *State v. Faust*, 6th Dist. No. L-97-1343, 1998 WL 161221, * 2 (Mar. 31, 1998). In *State v. Perry*, the Ohio Supreme Court addressed the nature and scope of the bar of res judicata:

> 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 an appeal from that judgment.

{¶ 15} The Ninth District Court of Appeals considered a similar challenge to an *Alford* plea in *State v. Houser*, 9th Dist. No. 21555, 2003-Ohio-6811. The appellant in the case claimed that the trial court's plea colloquy at the plea hearing was insufficient under *North Carolina v. Alford* to determine whether the plea was made knowingly and intelligently. *Id.* at ¶ 22.

{¶ 16} The court of appeals held in *Houser* that whether a trial court conducted the necessary inquiry at the plea hearing before accepting an *Alford* plea is a matter that an

appellate court can determine through a review of the transcript of the plea hearing. *Id*. The court concluded that the issue did not require consideration of evidence outside of the record and could have been raised on direct appeal. *Id.* The court concluded that the appellant was barred by res judicata from asserting the issue in a subsequent proceeding for postconviction relief because it could have been raised on direct appeal. *Id.*

{¶ 17} We agree with the reasoning of the Ninth District Court of Appeals in *Houser* and find it applicable here. Appellant's claim that the trial court erred in accepting appellant's *Alford* plea did not require consideration of evidence outside of the record on direct appeal. We conclude appellant is barred by res judicata from raising the issue in a subsequent Crim.R. 32.1 motion or application for postconviction relief. Accordingly, we find Assignment of Error No. 1 not well-taken.

{¶ 18} Justice having been provided the party complaining, we affirm the judgment of the Lucas County Court of Common Pleas. We order appellant to pay the 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.

Mark L. Pietrykowski, J.

_____
JUDGE

Arlene Singer, P.J.

_____
JUDGE

Thomas J. Osowik, J.
CONCUR.

_____
JUDGE