[Cite as *State v. Kelm*, 2013-Ohio-202.]

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

State of Ohio — Court of Appeals No. WD-11-024

Appellee — Trial Court No. 2009CR0258

v.

Kinley Kelm — **DECISION AND JUDGMENT**

Appellant — Decided: January 25, 2013

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
David E. Romaker, Jr., Assistant Prosecuting Attorney, for appellee.

Eric Allen Marks, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Kinley Kelm appeals a March 10, 2011 judgment of the Wood County Court of Common Pleas denying his March 2, 2011 motion to withdraw his guilty plea. On August 14, 2009, Kelm pled guilty to one count of a two-count indictment for theft. The other count was dismissed under a plea agreement. He pled guilty to a fourth degree felony theft offense, a violation of R.C. 2913.02(A)(1). A second count, charging a fifth degree felony theft under R.C. 2913.02(A)(1), was dismissed.

{¶ 2} On October 7, 2009, the trial court sentenced Kelm to serve an 18-month prison term. The court also ordered appellant to pay restitution in the amount of $4,000. Appellant did not appeal the October 7, 2009 judgment.

{¶ 3} This appeal concerns the second of two motions filed by Kelm to withdraw his guilty plea. Kelm filed his first motion on October 18, 2010. The trial court denied that motion in a judgment filed on November 24, 2010. Kelm did not appeal the November 24, 2010 judgment.

{¶ 4} Appellant asserts one assignment of error in his appeal of the March 10, 2011 judgment:

First Assignment of Error

> The trial court abused its discretion in denying appellant's motion to withdraw his no-contest plea.

{¶ 5} Despite the no contest wording of the first assignment of error, appellant acknowledges in his appellate brief that he did plead guilty to the theft offense.

{¶ 6} Appellant argues that he was denied effective assistance of counsel when he pled guilty. He argues that defense counsel was deficient in counseling him to plead guilty to the theft offense because the state was required to prove theft of property in value of $5,000 or more and less than $100,000 to secure a conviction and that the PSI report disclosed the property involved in the theft totaled only $4,000 in value.

{¶ 7} The state argues that appellant misreads the PSI report and that the report showed that the property stolen had a value of $9,093.50. According to the report, after

reimbursement for a portion of the loss by its insurer, the victim claimed an out of pocket loss of $4,430.18 due to the theft. The trial court ordered appellant to pay $4,000 as restitution.

{¶ 8} We find appellant's claim of ineffective assistance of counsel under the first assignment of error not well-taken on multiple grounds. In our view the claim is barred by res judicata.

{¶ 9} The ineffective assistance of counsel claim relies on evidence in the record and, consequently, is one that could have been raised by appellant on direct appeal from the judgment of conviction had he appealed the October 7, 2009 judgment. Appellant did not appeal the judgment of conviction. Under res judicata a convicted defendant is barred from subsequently litigating issues that were raised or could have been raised at trial or on direct appeal from a judgment of conviction:

> 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. State v. Perry, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus.

{¶ 10} Also, Ohio courts have recognized that res judicata bars successive Crim.R. 32.1 motions to withdraw guilty pleas, where the grounds to withdraw the plea were

raised or could have been raised in the initial motion to withdraw. *State v. Green*, 5th Dist. No. 2011 CA 00127, 2011-Ohio-5611, ¶ 25-26; *State v. Burnside*, 7th Dist. No. 09 MA 179, 2010-Ohio-3158, ¶ 5; *State v. McLeod*, 5th Dist. No. 2004 AP 03 0017, 2004-Ohio-6199, ¶ 12; *State v. Kent*, 4th Dist. No. 02CA21, 2003-Ohio-6156, ¶ 6.

{¶ 11} Finally, we agree with the state that the PSI report does not support a claim that the value of the property stolen was less than $5,000. With respect to the December 2007 theft to which appellant pled, the report provides an itemized listing of stolen property totaling $9,093.50 in value.

{¶ 12} We conclude that justice has been afforded the party complaining and affirm the judgment of the Wood 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.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE