

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

State of Ohio

Court of Appeals No. E-13-018

Appellee

Trial Court No. 2008-CR-352

v.

Ronald J. Dority

DECISION AND JUDGMENT

Appellant

Decided: November 15, 2013

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, Mary Ann
Barylski and Frank Romeo Zeleznikar, Assistant Prosecuting
Attorneys, for appellee.

Ronald J. Dority, pro se.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} This is an appeal from the judgment of the Erie County Court of Common Pleas, denying appellant's, Ronald Dority, postconviction motion to withdraw his guilty plea. We affirm.

A. Factual and Procedural Background

{¶ 2} In 2009, appellant pleaded guilty to felonious assault, violation of a temporary protection order, and kidnapping, and was sentenced to 12 years in prison. In 2011, we affirmed appellant's conviction in *State v. Dority*, 6th Dist. Erie No. E-09-027, 2011-Ohio-2438. Subsequently, on October 25, 2012, appellant filed a motion to withdraw his guilty plea on the basis that he was not informed that his five-year term of postrelease control was mandatory. The trial court denied appellant's motion without a hearing on March 21, 2013.

B. Assignment of Error

{¶ 3} Appellant has timely appealed the March 21, 2013 judgment, and now assigns one error for our review:

[W]hether the trial court abused its discretion (thereby violating due process) when it denied “without hearing” defendant's pre-sentence [sic] motion to withdraw guilty plea pursuant to the mandatory provisions of: *State v. Sarkozy*, 117 Ohio St.3d 86; *State v. Boswell*, 121 Ohio St.3d 575; *State v. Holcomb*, 2010 Ohio 4656 (Ohio App. 9 Dist.); and, Crim. R. 11(C)(2)(a). *See also*: O.R.C. § 2929.19(B)(3)(e); and, *State v. Nero* (1990), 56 Ohio St.3d 106, 108.

II. Analysis

{¶ 4} 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 an appellate court has affirmed the defendant’s conviction, the trial court has no authority to consider a motion to withdraw a guilty plea. *State v.*

Ketterer, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶ 62, citing *State ex rel.*

Special Prosecutors v. Judges, Court of Common Pleas, 55 Ohio St.2d 94, 97-98, 378

N.E.2d 162 (1978) (“Crim.R. 32.1 does not vest jurisdiction in the trial court to maintain

and determine a motion to withdraw the guilty plea subsequent to an appeal and an

affirmance by the appellate court. * * * [Crim.R. 32.1] does not confer upon the trial

court the power to vacate a judgment which has been affirmed by the appellate court, for

this action would affect the decision of the reviewing court, which is not within the power

of the trial court to do.”). Here, because we affirmed appellant’s conviction in *Dority*,

supra, the trial court does not have any authority to allow appellant to withdraw his guilty plea.

{¶ 5} Appellant disagrees, and argues that because he was not properly notified of postrelease control, his sentence is void, and thus his motion to withdraw his guilty plea should be treated as a presentence motion. *See State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, 906 N.E.2d 422, syllabus (“A motion to withdraw a plea of guilty or no contest made by a defendant who has been given a void sentence must be considered as a presentence motion under Crim.R. 32.1.”). However, this argument has been rejected in light of the amendment to R.C. 2929.191, and the Ohio Supreme Court’s determination

that sentences entered after July 11, 2006, which contain an error in the imposition of postrelease control, are not void. *See Ketterer* at ¶ 63.

{¶ 6} Furthermore, appellant's argument that he should be entitled to withdraw his guilty plea because he did not know that he was subject to mandatory postrelease control is barred by res judicata. *See State v. Madrigal*, 6th Dist. Lucas Nos. L-10-1142, L-10-1143, 2011-Ohio-798, ¶ 16 ("It is well established * * * that claims submitted in support of a Crim.R. 32.1 motion to withdraw plea that could have been raised on direct appeal, but were not raised on direct appeal, are barred by res judicata."); *Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9 at ¶ 59. Here, appellant was aware of the manner in which the trial court imposed postrelease control at the time of his initial appeal. Thus, the issue could have been raised on direct appeal. Because the issue was not raised, it is barred by res judicata.

{¶ 7} Finally, appellant's claim fails on its merits as there was no error in the imposition of postrelease control in this case. Appellant argues that he did not know that postrelease control was mandatory. However, the transcript from the change of plea hearing reveals that the court notified appellant that, "[I]f you were to go to prison and weren't released for any reason that you *shall* have five years of what's called post release [sic] control." (Emphasis added.) Appellant stated that he understood. Moreover, the plea form that appellant signed again indicated that he "shall have" five years of postrelease control. Because the term "shall" leaves no doubt that postrelease control was mandatory, appellant cannot demonstrate the manifest injustice necessary to

allow for withdrawal of his guilty plea. *See State v. Lake*, 6th Dist. Wood No. WD-10-058, 2012-Ohio-1236, ¶ 6.

{¶ 8} Accordingly, appellant's assignment of error is not well-taken.

III. Conclusion

{¶ 9} For the foregoing reasons, the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered 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.

Thomas J. Osowik, J.

Stephen A. Yarbrough, J.

James D. Jensen, 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>
