

[Cite as *State v. Nicholson*, 2009-Ohio-5004.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92498

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

THOMAS NICHOLSON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-422675

BEFORE: Jones, J., McMonagle, P.J., and Blackmon, J.

RELEASED: September 24, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Thomas Nicholson (“Nicholson”), appeals the trial court’s denial of his motion to withdraw his guilty plea. Finding no merit to the appeal, we affirm.

{¶ 2} In 2002, Nicholson pled guilty to aggravated burglary, kidnapping, two counts of rape, and aggravated robbery. All counts contained firearm specifications.

{¶ 3} On the day of his sentencing hearing, Nicholson orally moved to withdraw his guilty plea and requested a continuance to file a formal motion to withdraw the plea. The court denied the oral motion. The court then proceeded with the sentencing hearing and sentenced Nicholson to an aggregate sentence of 23 years in prison. This court granted Nicholson’s motion to file a delayed appeal and found that the trial court erred in denying Nicholson’s motion to withdraw his guilty plea without first holding a hearing on the motion. *State v. Nicholson*, Cuyahoga App. No. 82825, 2004-Ohio-2394 (“*Nicholson I*”).

{¶ 4} On remand, the trial court held a hearing on Nicholson’s motion and denied his request to withdraw his plea. The trial court further informed Nicholson that his sentence was “reinstated.” Nicholson appealed again, this time arguing that the trial court erred in not allowing him to withdraw his plea and claiming irregularities about his sentence. Specifically, Nicholson argued that the trial court failed to comply with Crim.R. 11(C) by failing to advise him of his right of compulsory process of witness, erred by ordering consecutive sentences

without making appropriate findings, and erred in sentencing him to more than the minimum prison sentence. *State v. Nicholson*, Cuyahoga App. No. 85201, 2005-Ohio-4670 (“*Nicholson II*”). This court found that those claims were barred by res judicata. Id.

{¶ 5} In *Nicholson II*, Nicholson further claimed that the trial court erred in not granting his motion to withdraw his plea. This court held:

{¶ 6} “The record demonstrates that the trial court complied with the mandates of Crim.R. 11(C) and determined that Appellant had failed to produce sufficient evidence that he had a reasonable and legitimate basis for the withdrawal of his plea. * * * Accordingly, we find that the trial court did not abuse its discretion in denying Appellant’s motion to withdraw his guilty plea.” Id.

{¶ 7} In 2006, Nicholson applied to reopen his initial appeal, but this court denied his application as untimely. *State v. Nicholson*, Cuyahoga App. No. 82825, 2006-Ohio-3020 (“*Nicholson III*”).

{¶ 8} In 2008, Nicholson filed pro se motions to withdraw his guilty plea, vacate his “void judgment of conviction,” and vacate his void sentence. The trial court appointed counsel to represent Nicholson and held a hearing. At the hearing, Nicholson argued that he should be allowed to withdraw his 2002 guilty plea because the trial court did not properly advise him of postrelease control and that certain convictions should have merged for the purposes of sentencing. The trial court denied his motions and resentenced Nicholson to the same sentence and appointed counsel to represent him on appeal.

{¶ 9} Nicholson now appeals, raising one assignment of error for our review, in which he argues that the trial court erred in failing to allow him to withdraw his original 2002 guilty plea.¹

{¶ 10} We find that Nicholson's claim that the trial court erred in denying his motion to withdraw his guilty plea is barred by the doctrine 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 appeal from that judgment." *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus.

{¶ 11} Additionally, a trial court has no jurisdiction to grant a motion to withdraw a plea after the plea and judgment have been affirmed on appeal. *State v. Vild*, Cuyahoga App. Nos. 87742, and 87965, 2007-Ohio-987. "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." *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d 94, 97, 378 N.E.2d 162. "While Crim.R.

¹Since Nicholson has not raised any issues with regard to his resentencing on appeal, we decline to analyze any potential issues with his sentence. We do note that the trial court did have jurisdiction to resentence Nicholson and properly advised him of postrelease control at the resentencing hearing.

32.1 apparently enlarges the power of the trial court over its judgments without respect to the running of the court term, it 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.” *Id.*; See, also, *State v. McCarroll*, Cuyahoga App. No. 92012, 2009-Ohio-623; *State v. Craddock*, Cuyahoga App. No. 87582, 2006-Ohio-5915, ¶8-9.

{¶ 12} In this case, Nicholson has already appealed the trial court’s denial of his motion to withdraw his guilty plea; we affirmed the lower court’s decision in *Nicholson II*. Thus, the trial court had no jurisdiction to permit Nicholson to withdraw his plea thereafter and this court cannot now review the trial court’s denial of Nicholson’s motion to withdraw his plea because his claim is barred by res judicata. *McCarroll*.

{¶ 13} Furthermore, even if Nicholson’s claim was not barred by res judicata and the trial court had jurisdiction to consider his motion, Nicholson failed to file the transcript of his 2002 plea hearing; therefore, we would presume regularity of the trial court proceedings. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 400 N.E.2d 384.

{¶ 14} Therefore, the sole assignment of error is overruled.

{¶ 15} Accordingly, judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

CHRISTINE T. MCMONAGLE, P.J., and
PATRICIA A. BLACKMON, J., CONCUR