

[Cite as *State v. Seals*, 2010-Ohio-1980.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93198

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAMON SEALS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-471503 and CR-475966

BEFORE: Gallagher, A.J., McMonagle, J., and Celebrezze, J.

RELEASED: May 6, 2010

JOURNALIZED:

FOR APPELLANT

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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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant, Damon Seals, appeals the judgment of the Cuyahoga County Court of Common Pleas that denied his petition for postconviction relief or alternatively motion to withdraw plea. For the reasons stated herein, we affirm.

{¶ 2} In October and November 2005, Seals was indicted on various charges in the two underlying cases, CR-471503 and CR-475966. On February 21, 2006, Seals entered guilty pleas to four felony-three vehicular assault charges, two DUI charges, and one amended count of second-degree preparation of drugs for sale. The remaining counts were nolle. On March 20, 2006, the trial court sentenced Seals to an aggregate prison term of 11 years in both cases, with 5 years of postrelease control. Seals also received a 20-year driver's license suspension.

{¶ 3} Seals appealed his sentence to this court. On March 1, 2007, this court affirmed in part, vacated in part, and remanded the matter to the trial court for resentencing. *State v. Seals*, Cuyahoga App. No. 88047, 2007-Ohio-819. This court found that the trial court appropriately advised Seals of the terms and conditions of postrelease control, but that three years, not five years, was the required term of postrelease control for Seals's convictions. *Id.* The panel further determined that the imposition of

consecutive sentences was the result of an agreed-upon sentence and part of the plea agreement. Id.

{¶ 4} On May 10, 2007, the trial court conducted a resentencing hearing and sentenced Seals to a total prison term of 11 years with 3 years of postrelease control. No direct appeal was filed.

{¶ 5} On December 6, 2007, Seals filed a petition for postconviction relief or alternatively motion to withdraw plea in both of the underlying cases. The trial court denied Seals's request for a hearing; denied the petition on grounds that it was untimely, failed to meet the requirements for consideration of an untimely petition, and was barred by res judicata; and found the motion to withdraw was barred by res judicata. Seals now appeals this ruling and raises six assignments of error for our review.

{¶ 6} Seals's first assignment of error challenges the trial court's denial of his petition for postconviction relief as untimely. A trial court's decision granting or denying a postconviction petition should be upheld absent an abuse of discretion. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77. "The term 'abuse of discretion' * * * implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 7} Under R.C. 2953.21(A)(2), when no direct appeal is taken, a petitioner must file his petition for postconviction relief no later than 180

days after the expiration of the time for filing the direct appeal of the judgment of conviction. Ohio case law indicates that the time limit for a postconviction relief petition runs from the original appeal of the conviction, and that a resentencing hearing does not restart the clock for postconviction relief purposes as to any claims attacking the underlying conviction. *State v. Haschenburger*, Mahoning App. No. 08-MA-223, 2009-Ohio-6527; *State v. O'Neal*, Medina App. No. 08CA0028-M, 2008-Ohio-6572; *State v. Casalicchio*, Cuyahoga App. No. 89555, 2008-Ohio-2362.

{¶ 8} In this case, Seals's petition was directed at errors in the original proceedings, not the resentencing. Therefore, those errors should have been raised in a timely petition following his original conviction and sentence. Further, Seals has failed to demonstrate the requirements to file an untimely petition under R.C. 2953.23(A). Insofar as he alleges he was induced into taking the plea offer by assurances that his sentence would fall into a particular range, Seals would have been aware of these facts at the time of his original sentencing. While initially he may have been unable to obtain an affidavit from his attorney, the averments therein do not constitute newly discovered evidence.

{¶ 9} Because Seals failed to file a timely petition following his original conviction and sentence, the trial court did not abuse its discretion in denying

his petition. His first assignment of error is overruled, and the remaining issues pertaining to the petition are moot.

{¶ 10} We address Seals's second, third, fourth, fifth, and sixth assignments of error together with relation to his motion to withdraw his guilty plea. We review a trial court's decision on a motion to withdraw a plea under an abuse of discretion standard. *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355, ¶32.

{¶ 11} Under these assignments of error, Seals claims ineffective assistance of counsel with regard to his plea and sentence; asserts his claims are not barred by res judicata and the trial court had jurisdiction to consider his motion; claims the trial court failed to impose a sentence consistent with the plea agreement; and argues the sentence imposed by the trial court and the imposition of a 20-year license suspension created a manifest injustice. We find that his claims are barred by res judicata.

{¶ 12} It is well recognized that the doctrine of res judicata bars claims that were raised or could have been raised on direct appeal. *State v. Davis*, 119 Ohio St.3d 422, 2008-Ohio-4608, 894 N.E.2d 1221. Consistent therewith, this court has consistently recognized that the doctrine of res judicata bars all claims raised in a Crim.R. 32.1 postsentence motion to withdraw a guilty plea that were raised or could have been raised on direct appeal. *State v. Johns*, Cuyahoga App. No. 92627, 2010-Ohio-68; *State v.*

McGee, Cuyahoga App. No. 91638, 2009-Ohio-3374. Because Seals could have raised the issues presented in his motion in a direct appeal, he is precluded by res judicata from raising the issues through a motion to withdraw a plea, and the trial court was not required to hold a hearing on the motion. We overrule the remaining assignments of error.

Judgment affirmed.

It is ordered that appellee recover from 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.

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

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

CHRISTINE T. MCMONAGLE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR