

[Cite as *State v. McCarroll*, 2010-Ohio-2107.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93956

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

EZEKIAL MCCARROLL

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-306381

BEFORE: Dyke, J., Gallagher, A.J., and Sweeney, J.

RELEASED: May 13, 2010

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), 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).

ANN DYKE, J.:

{¶ 1} This appeal is before the Court on the accelerated docket pursuant to App.R. 11.1 and Loc. App.R. 11.1.

{¶ 2} Defendant Ezekial McCarroll appeals from the order of the trial court that denied his motion for relief after judgment of conviction, entered upon his 1994 guilty plea to one count of aggravated murder with a felony specification. For the reasons set forth below, we affirm.

{¶ 3} The facts of this matter were recently set forth by this court in *State v. McCarroll*, Cuyahoga App. No. 92012, 2009-Ohio-623, as follows:

{¶ 4} “On February 3, 1994, appellant was indicted on two counts of aggravated murder, each with a felony murder and firearm specifications, and one count of aggravated robbery with a firearm specification. On April 25, 1994, appellant entered into a plea agreement with an agreed-upon sentence. Appellant pleaded guilty to Count Two, aggravated murder with a felony specification. Upon recommendation by the state, the [three-judge panel] trial court nolle Counts One and Three as well as the firearm specification on Count Two. On this same date, the trial court sentenced appellant to 30 years to life in prison, with eligibility for parole after 30 years.

{¶ 5} “On February 2, 1999, appellant filed a motion to file a notice of delayed appeal, which this court denied. On July 28, 2008, appellant filed a motion to withdraw his guilty plea pursuant to Crim.R. 32.1.”

{¶ 6} Defendant argued that the three-judge panel did not comply with Crim.R. 11(C)(3), and violated R.C. 2945.05 and R.C. 2945.06, in accepting his

guilty plea. On August 6, 2008, the trial court denied appellant's motion to vacate the guilty plea. This court affirmed on appeal, concluding that a trial court has no jurisdiction to grant a motion to withdraw a plea after the plea and judgment have been affirmed on appeal. This court explained:

{¶ 7} “In the case at bar, appellant's prior appeal was dismissed. The trial court had no jurisdiction to permit appellant to withdraw his plea thereafter. Furthermore, this court cannot now review the trial court's denial of appellant's motion to withdraw his plea because his claims are barred by the doctrine of res judicata.” *State v. McCarroll*, supra.

{¶ 8} The record further indicates that on August 21, 2009, defendant filed a motion for relief after judgment, pursuant to Civ.R. 60(B)(5),¹ again arguing that the three-judge panel violated Crim.R. 11(C)(3), and R.C. 2945.06 in accepting his guilty plea.

{¶ 9} It is well established that 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

¹ Although defendant brought his motion pursuant to Civ.R. 60(B)(5), it nonetheless meets the “definition of a motion for postconviction relief set forth in R.C. 2953.21(A)(1), because it is a motion that (1) was filed subsequent to [defendant's] direct appeal, (2) claimed a denial of constitutional rights, (3) sought to render the judgment void, and (4) asked for vacation of the judgment and sentence.” See *State v. Reynolds*, 79 Ohio St.3d 158, 160, 1997-Ohio-304, 679 N.E.2d 1131.

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* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus. Thus, any claim for postconviction relief that was or could have been raised on direct appeal is barred from consideration by the doctrine of res judicata. *State v. Williams*, 157 Ohio App.3d 374, 2004-Ohio-2857, 811 N.E.2d 561, citing *State v. Perry*, supra. Res judicata, however, does not bar claims for postconviction relief when the petitioner presents evidence outside the record that was not in existence and was not available to the petitioner in time to support a direct appeal. *State v. Cole* (1982), 2 Ohio St.3d 112, 443 N.E.2d 169.

{¶ 10} In this matter, the entire basis for defendant's petition for postconviction relief, i.e., that the three-judge panel violated Crim.R. 11(C)(3), and R.C. 2945.06 in accepting his guilty plea, has already been considered and rejected by this court. See *State v. McCarroll*, supra. Defendant therefore raises a collateral attack upon this previously decided matter so the claim is barred by res judicata. *State v. Tucker*, Cuyahoga App. No. 90799, 2008-Ohio-5746; *State v. Dave*, Stark App. No. 2006-CA-00149, 2006-Ohio-6558; *State v. Conley*, Summit App. No. 05CA0057-M, 2005-Ohio-6218. Accordingly, the doctrine of res judicata prevents this collateral attack on the trial court's judgment.

{¶ 11} In addition, because defendant's claims are barred by the doctrine of res judicata, the trial court was not required to hold an evidentiary hearing on his

petition. *State v. Scudder* (1998), 131 Ohio App.3d 470, 722 N.E.2d 1054.

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. 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.

ANN DYKE, JUDGE

SEAN C. GALLAGHER, A.J., and
JAMES J. SWEENEY, J., CONCUR