

[Cite as *State v. Cobb*, 2010-Ohio-5118.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93404

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL COBB

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-354043

BEFORE: Celebrezze, J., Rocco, P.J., and Jones, J.

RELEASED AND JOURNALIZED: October 21, 2010

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Michael Cobb, appeals from the denial of his motion to withdraw his guilty plea and from his resentencing. After a thorough review of the record and case law, we affirm the denial of appellant's motion to withdraw his guilty plea, but remand the case to the trial court to correct the improper imposition of postrelease control.

Procedural History

{¶ 2} Appellant pled guilty in 1998 to the robbery and murder of John Weeks and received an 18-year-to-life prison sentence consisting of 15 years to life for murder, five years for robbery to be served concurrently, plus a three-year term for a firearm specification to be served consecutively. The facts associated with these convictions were recited in a previous appeal, *State v. Cobb*, Cuyahoga App. No. 76950, 2001-Ohio-4132 ("*Cobb I*"). In this previous appeal, appellant challenged the validity of his plea, arguing it was not knowingly, voluntarily, and intelligently made because the trial court failed to comply with Crim.R. 11. This court affirmed appellant's convictions finding that the trial court substantially complied with Crim.R. 11 when it engaged appellant in a plea colloquy.

{¶ 3} During this unsuccessful appeal, appellant filed an untimely motion for postconviction relief pursuant to R.C. 2953.21 on July 17, 2000. In this motion, he claimed that his counsel was ineffective, which necessitated relief. The trial court found this motion untimely, which was

affirmed by this court in *State v. Cobb*, Cuyahoga App. No. 80265, 2002-Ohio-2138 (“*Cobb II*”).

{¶ 4} Appellant then filed a motion to vacate his sentence on July 18, 2005, arguing that he had not entered a separate plea to a firearm specification, which was required. The trial court denied this motion, and this court dismissed the appeal taken from this ruling because appellant failed to file the record.

{¶ 5} Then, on February 6, 2009, appellant filed a motion to “vacate and correct void sentence” with the trial court. The state joined in the motion, conceding that appellant’s sentence failed to include postrelease control. The trial court scheduled a hearing for resentencing. Two days before the hearing, appellant filed a motion to withdraw his guilty pleas pursuant to Crim.R. 32.1. The trial court held a hearing on appellant’s motion to withdraw his pleas and determined that it was barred by res judicata and also failed on the merits. The trial court then resentenced appellant to his original sentence with the addition of five years of postrelease control on the robbery conviction. The journal entry documenting the court’s decision incorrectly states that postrelease control of five years was imposed on the murder conviction and the robbery conviction. Appellant brings the instant appeal assigning six errors.

Law and Analysis

Withdrawal of Plea and Res Judicata

{¶ 6} Appellant argues that his sentence is void and, as such, res judicata cannot apply. Appellant contends that because his previous sentence is void, it deprived this court of jurisdiction to hear any prior appeal, and therefore, it is as if his prior appeals never occurred.

{¶ 7} In *State v. Boswell*, 121 Ohio St.3d 575, 576, 2009-Ohio-1577, 906 N.E.2d 422, the Ohio Supreme Court determined that a motion to withdraw a guilty plea after the imposition of a void sentence was to be treated as a presentence motion, which should be liberally granted. The court remanded the case to determine if there was a legitimate basis for withdrawal.

{¶ 8} Crim.R. 32.1 governs motions to withdraw guilty pleas and states in pertinent part that “[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed * * *.” Although “presentence motions to withdraw guilty pleas should be freely granted, a defendant ‘does not have an absolute right to withdraw a plea prior to sentencing.’” *State v. McGregor*, Cuyahoga App. No. 86165, 2005-Ohio-5561, ¶3, quoting *State v. Xie* (1992), 62 Ohio St.3d 521, 527, 584 N.E.2d 715. “Instead, the trial court ‘must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea.’” *Id.* *Boswell*, however, did not address the application of res judicata.

{¶ 9} In *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381, 1995-Ohio-331, 653 N.E.2d 226, the Ohio Supreme Court stated that the doctrine of res judicata bars not only subsequent actions involving the same legal theory of recovery as the previous action, but also claims that could have been litigated in the previous action, finding: “It has long been the law of Ohio that “an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were *or might have been* litigated in a first lawsuit”” Id. at 382, quoting *Natl. Amusements, Inc. v. City of Springdale* (1990), 53 Ohio St.3d 60, 62, 558 N.E.2d 1178, quoting *Rogers v. Whitehall* (1986), 25 Ohio St.3d 67, 69, 494 N.E.2d 1387. Further, the court held that “[t]he doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it.” Id., quoting *Natl. Amusements* at 62.

{¶ 10} This doctrine applies to Crim.R. 32.1 motions. *State v. Fountain*, Cuyahoga App. Nos. 92772 and 92874, 2010-Ohio-1202, ¶9 (“this court has consistently recognized that the doctrine of res judicata bars all claims raised in a Crim.R. 32.1 motion that were raised or could have been raised in a prior proceeding, including a direct appeal.”).

{¶ 11} In *Fountain*, this court found that “the application of res judicata to a motion to withdraw is not impacted by a void sentence.” Id. *Fountain* attempted to withdraw his plea, complaining that the trial court misinformed

him about postrelease control. *Id.* at ¶11. This court determined that these claims were known at the time appellant had to instigate an appeal and should have been raised therein. The application of res judicata in this manner is further supported by the federal district court in this jurisdiction. See *Newman v. Wilson* (Apr. 30, 2009), N.D. Ohio No. 5:08 CV 483.

{¶ 12} In the present case, appellant's multiple, successive attempts to withdraw his plea based on information known at the time he instigated his direct appeal bars further litigation. *State v. Tate*, Cuyahoga App. No. 93936, 2010-Ohio-2357, ¶7-9; *Fountain* at ¶8-11. Accordingly, appellant's first, fourth, fifth, and sixth assignments of error are overruled.¹

Imposition of Postrelease Control

{¶ 13} Appellant's second assignment of error alleges that "[t]he trial court erred by imposing postrelease control in violation of R.C. 2967.28, rendering [appellant's] sentence void as a matter of law."

{¶ 14} The journal entry memorializing appellant's 2009 resentencing states, "[appellant] advised of 5 years post-release control on each count 1 and 5." There are two problems with this statement. First, Count 1 is a conviction for murder, an unclassified felony where postrelease control should not be imposed. R.C. 2967.28. Second, robbery, a second-degree felony,

¹These assigned errors are included in the appendix attached hereto.

carries a mandatory three-year term of postrelease control, not five. R.C. 2967.28(B)(2).

{¶ 15} There is a third problem. This court, in *State v. Dresser*, Cuyahoga App. No. 92105, 2009-Ohio-2888, reversed on other grounds in *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671, 931 N.E.2d 110, has recently held that it is the expiration of the sentence for which postrelease control is applicable that determines whether a court may correct a sentencing error and impose postrelease control at resentencing.

{¶ 16} In *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, the Ohio Supreme Court held, “[i]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence.” *Id.* at the syllabus. Once that sentence has been served, the court can no longer correct sentencing errors and impose postrelease control at resentencing. *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961. *Dresser* clarified this holding, determining that it was the expiration of the individual terms, not the overall sentence that precludes trial courts from correcting errors in postrelease control at resentencing, holding “it is the expiration of the prisoner’s journalized sentence, rather than the offender’s

ultimate release from prison that is determinative of the trial court's authority to resentence." Id. at ¶11, citing *State v. Bristow*, Lucas App. No. L-06-1230, 2007-Ohio-1864; *State v. Turner*, Franklin App. No. 06AP-491, 2007-Ohio-2187; *State v. Ferrell*, Hamilton App. No. C-070799, 2008-Ohio-5280.

{¶ 17} Appellant's robbery conviction carried a prison term of five years, and the state concedes that it was satisfied in 2003. Therefore, the trial court was without authority to impose postrelease control at appellant's resentencing. Appellant's second assignment of error is sustained. This case must be remanded for reimposition of appellant's original sentence without any term of postrelease control.

Delay in Sentencing

{¶ 18} Appellant argues that "[t]he trial court erred in sentencing [appellant] more than twelve years after his plea, as such a delay between sentencing is unreasonable and the trial court no longer had jurisdiction to impose any sentence."

{¶ 19} Appellant cites to cases dealing with a long delay between a finding of guilt and the imposition of sentence to support a claim that the delay in his original sentence and the 2009 resentencing act to deprive the trial court of jurisdiction. However, these cases are factually distinguishable. In *State v. Mack*, Cuyahoga App. No. 92606,

2009-Ohio-6460, the trial court imposed a term of incarceration, but left other penalties to be worked out after this prison term was served. When appellant was released from prison without the imposition of those additional penalties, the court lost jurisdiction to impose any further sanctions because appellant had served his validly-imposed sentence.

{¶ 20} In the present case, appellant is still incarcerated. The Ohio Supreme Court in *Simpkins*, supra, recognized that the court loses jurisdiction to resentence a defendant where an imposed sentence has been satisfied. *Id.* at the syllabus. Because appellant is still serving his prison term, the trial court retains jurisdiction to resentence him. See *Smith v. Cuyahoga Cty. Sheriff's Dept.*, Cuyahoga App. No. 94626, 2010-Ohio-1763, ¶9-11. Appellant's third assignment of error is overruled.

Conclusion

{¶ 21} Appellant's argument that his sentence is void is barred by res judicata. His arguments are based on information known to him at the time he brought his first appeal, his postconviction relief petition, and his first attempt to withdraw his plea. However, when appellant was resentenced, the trial court improperly imposed postrelease control on an unclassified felony and on a conviction for which the stated prison term had expired. Therefore, this cause is affirmed, but remanded to the lower court for reimposition of the previous sentencing order, without postrelease control.

Cause affirmed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the 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.

FRANK D. CELEBREZZE, JR., JUDGE

KENNETH A. ROCCO, P.J., and
LARRY A. JONES, J., CONCUR

APPENDIX

Appellant's Assignments of Error I, IV, V, and VI:

I. "The trial court erred by denying Mr. Cobb's presentence motion to withdraw his guilty plea."

IV. "Because a void sentence precludes a valid judgment of conviction, the previous appeal is a legal nullity and an appeal following a *de novo* sentencing under *Bezak* and progeny is the first appeal of right that could validly be the subject of an appeal."

V. "The trial court abused its discretion when it denied [appellant's] pre-sentence Crim.R. 32.1 motion to vacate guilty plea, because he was not afforded a full hearing pursuant to Crim.R. 11, before he entered the plea, thereby denying him due process of and equal protection of the law in violation of the Fourteenth Amendment to the U.S. Constitution and Article 1, Section 2 and 16 of the Ohio Constitution."

VI. “The trial court erred to the prejudice of [appellant] during the plea hearing in violation of the Fourteenth Amendment to the U.S. Constitution when, prior to accepting his plea, it failed to inform him of the mandatory three-year term of post-release control — the maximum penalty involved under Crim.R. 11(C)(2)(a) with respect to the robbery offense.”