

[Cite as *State v. Farraj*, 2015-Ohio-1292.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101468

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SAMI FARRAJ

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-07-499710-A

BEFORE: Keough, P.J., E.A. Gallagher, J., and Stewart, J.

RELEASED AND JOURNALIZED: April 2, 2015

APPELLANT

Sami Farraj, pro se
No. 551275
P.O. Box 901
Trumbull Correctional Institution
Leavittsburg, Ohio 44430

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
By: Amy Venesile
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

KATHLEEN ANN KEOUGH, P.J.:

{¶1} Defendant-appellant, Sami Farraj (“Farraj”), appeals the judgment of the trial court denying his postsentence motion to withdraw his guilty plea. Finding no merit to the appeal, we affirm.

I. Background

{¶2} In 2007, Farraj was indicted on one count of rape, three counts of kidnapping, two counts of gross sexual imposition, three counts of aggravated burglary, and one count of theft. The charges stemmed from an incident where Farraj stole several unsecured laptops while he was at Fairview Hospital, and then entered three female patients’ rooms looking for bags or luggage in which he could hide the computers. Farraj sexually molested the patients when he was in their rooms.

{¶3} Farraj subsequently pleaded guilty to amended counts of sexual battery, abduction, gross sexual imposition, burglary, and theft. The trial court sentenced him to ten years in prison, followed by a “suspended sentence” of 19 years unless he was deported upon his release. On appeal, this court reversed Farraj’s convictions, finding that his guilty plea was induced by the trial court’s promise of a ten-year sentence. *State v. Farraj*, 8th Dist. Cuyahoga No. 91771, 2009-Ohio-1796, ¶10.

{¶4} On December 3, 2009, upon remand, Farraj again pleaded guilty to sexual battery, abduction, gross sexual imposition, burglary, and theft, and the trial court sentenced him to ten years incarceration. Farraj did not appeal his convictions.

{¶5} Nearly four years later, he filed a petition to vacate or set aside the judgment of conviction, arguing that his plea was not made knowingly and intelligently because he had been denied effective assistance of counsel. The state filed a motion for summary judgment regarding the petition and, on May 28, 2013, the trial court granted the state's motion and denied the petition.

{¶6} On August 13, 2013, Farraj filed a motion for leave to file a delayed appeal from his 2009 plea and sentencing; this court denied the motion and dismissed the appeal. *State v. Farraj*, 8th Dist. Cuyahoga No. 100250 (Sept. 3, 2013).

{¶7} In February 2014, Farraj filed another petition to set aside or vacate the judgment of conviction. In this petition, Farraj argued that the trial court had violated his due process rights at sentencing by not informing him of his right to appeal and, in fact, by telling him that he had waived those rights as part of his plea arrangement. The state filed a motion for summary judgment regarding the petition; the trial court subsequently granted the state's motion and denied the petition. This court affirmed the trial court's judgment on appeal. *State v. Farraj*, 8th Dist. Cuyahoga No. 101592, 2015-Ohio-____.

{¶8} Then, on April 22, 2014, Farraj filed a motion to withdraw his guilty plea "on the most serious offenses." Specifically, Farraj sought to withdraw his guilty plea to the sexual battery and abduction charges related to one of the victims. In his motion, Farraj again argued that his plea was not made knowingly and intelligently because he had been denied effective assistance of counsel. He also argued that his plea was

defective because at sentencing, the trial court had failed to properly merge several of the offenses as allied offenses. The trial court denied the motion, and this appeal followed.

II. Analysis

{¶9} In his assignment of error, Farraj contends that the trial court erred in denying his motion to withdraw his plea.

{¶10} Because this is a postsentence motion to withdraw a guilty plea, we apply Crim.R. 32.1, which permits a criminal defendant to withdraw a plea after the imposition of sentence only to correct a manifest injustice. *State v. Xie*, 62 Ohio St.3d 521, 526, 584 N.E.2d 715 (1992). An appellate court will not reverse a trial court's denial of a motion to withdraw a plea absent an abuse of discretion. *Id.* at 527. "Abuse of discretion" implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). The trial court did not abuse its discretion in denying Farraj's motion to withdraw his plea because the issues raised in the motion are barred by res judicata.

Res judicata bars the assertion of claims against a valid, final judgment of conviction that have been raised or could have been raised on appeal. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus (1967). Ohio courts of appeals have applied res judicata to bar the assertion of claims in a motion to withdraw a guilty plea that were or could have been raised at trial or on appeal. See *State v. McGee*, 8th Dist. Cuyahoga No. 91638, 2009-Ohio-3374, ¶ 9; *State v. Totten*, 10th Dist. Franklin No. 05AP-278 and 05AP-508, 2005-Ohio-6210, ¶ 7.

State v. Ketterer, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶ 59.

{¶11} Farraj failed to timely appeal from his convictions, and this court dismissed the untimely appeal he filed in 2013. Thus, he has waived his right to challenge anything

that he could have raised in a direct appeal. “Exceptions to res judicata apply to void judgments or to claims that are supported by evidence outside the record.” *State v. Britford*, 10th Dist. Franklin No. 11AP-646, 2012-Ohio-1966, ¶ 8. However, no such exception applies here.

{¶12} In his motion to withdraw, Farraj argued that his counsel was ineffective because he allegedly (1) did not properly advise him that a deceased victim’s police statement was inadmissible; (2) did not depose the victim before she died; (3) did not file a motion to suppress the deceased victim’s statement; (4) did not adequately investigate the case and prepare for trial; and (5) allowed him to plead guilty to and be sentenced to several offenses that were allied but not merged at sentencing. But these alleged issues were all known at the time when Farraj could have perfected a timely appeal. Because Farraj did not timely appeal, the issues are waived.

{¶13} Contrary to Farraj’s assertion, the failure to merge allied offenses at sentencing does not render a sentence void and therefore not subject to the doctrine of res judicata. “Sentences that involve alleged errors in the merger of allied offenses are avoidable and not void; thus, res judicata will prevent any collateral attack challenging the imposition of allied offenses.” *State v. Holmes*, 8th Dist. Cuyahoga No. 100388, 2014-Ohio-3816, ¶ 17, citing *State v. Hough*, 2013-Ohio-1543, 990 N.E.2d 653, (8th Dist.) and *State v. Segines*, 8th Dist. Cuyahoga No. 99789, 2013-Ohio-529 (res judicata bars postconviction appeals collaterally attacking the trial court’s failure to merge offenses at sentencing when the issue was not raised on direct appeal). “A defendant

must raise on direct appeal the issue of whether two offenses constitute allied offenses of similar import subject to merger. If the defendant does not raise the issue on direct appeal and then attempts to raise the issue in a postconviction motion, res judicata applies.” *Hough* at ¶ 30. Because Farraj did not raise the allied offense issue on direct appeal, he could not raise it in a postconviction motion to withdraw his plea.

{¶14} Moreover, even putting aside the fact that Farraj did not file a direct appeal, our review of the record demonstrates that with the exception of the allied offenses argument, Farraj raised the very same arguments regarding counsel’s alleged ineffectiveness in his first petition to vacate or set aside the judgment of conviction, filed on March 25, 2013, that he raised in his motion to withdraw his plea. Res judicata bars the assertion of claims in a motion to withdraw a guilty plea that were, or could have been, raised in a prior proceeding. *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, at ¶ 59, citing *State v. McGee*, 8th Dist. Cuyahoga No. 91638, 2009-Ohio-3374, ¶ 9. Because Farraj’s claims regarding counsel’s alleged ineffectiveness were raised and rejected by the trial court in his first petition to vacate the conviction, the doctrine of res judicata precluded him from raising the same claims in his motion to withdraw his plea.

{¶15} Because the claims raised in the motion to withdraw the plea were barred by res judicata, the trial court did not abuse its discretion in denying the motion. The assignment of error is therefore overruled.

{¶16} 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.

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

EILEEN A. GALLAGHER, J., and
MELODY J. STEWART, J., CONCUR