

[Cite as *State v. Spann*, 2015-Ohio-1641.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 101595

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**ALBERT SPANN**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
AFFIRMED IN PART, REVERSED IN PART,  
AND REMANDED

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-08-513194-A

**BEFORE:** S. Gallagher, J., Boyle, P.J., and Laster Mays, J.

**RELEASED AND JOURNALIZED:** April 30, 2015

**FOR APPELLANT**

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SEAN C. GALLAGHER, J.:

{¶1} Defendant Albert Spann appeals from the trial court’s decision denying his Crim.R. 32.1 motion to withdraw a guilty plea. For the following reasons, we affirm in part, reverse in part, and remand for the limited purpose of issuing a nunc pro tunc correction of the final sentencing entry in order to properly impose postrelease control.

{¶2} On June 22, 2009, Spann pleaded guilty to aggravated murder in violation of R.C. 2903.01(A), with notice of a prior conviction and repeat violent offender specification, and aggravated robbery in violation of R.C. 2911.01(A)(1), also with notice of a prior conviction and repeat violent offender specification. The trial court sentenced Spann to a term of imprisonment of 25 years to life on the aggravated murder count, and ten years on the aggravated robbery count to be served concurrently to the indefinite life sentence. The court also imposed a a five-year mandatory term of postrelease control. Spann did not directly appeal his conviction.<sup>1</sup>

{¶3} Instead, on March 15, 2012, Spann filed a “Petition to Vacate or Set Aside Judgment of Conviction or Sentence.” In that filing, Spann claimed that the trial court failed to evaluate his mental capacity. The trial court denied that motion. On November 28, 2012, Spann filed another motion, captioned “Motion to Strike and/or

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<sup>1</sup>In his motion to withdraw his guilty plea, Spann briefly referenced a claim that the trial court failed to advise him of his appellate rights at his sentencing hearing. That claim, however, was not assigned as error in the current appeal and is now waived. Further, the transcript of Spann’s sentencing hearing was not included in the record, and we therefore would have to presume regularity. *See* App.R. 9(B).

Resentencing,” challenging the imposition of postrelease control. And finally, on August 30, 2013, Spann filed a motion to withdraw his plea pursuant to Crim.R. 32.1. The trial court denied the last two motions on June 16, 2014. Spann immediately appealed, advancing five assignments of error, all but one of which lack merit.

{¶4} In his first and second assignments of error, Spann claims the trial court erred in denying his motion to withdraw his plea based on Spann’s claim that the trial court failed to consider his mental competency to stand trial and knowingly enter the plea. There is no merit to the first two assigned errors.

{¶5} Spann’s claims are governed by Crim.R. 32.1, which provides that in order “to correct manifest injustice[,] the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.” The defendant has the burden of proof, and postsentence withdrawal of a guilty plea is only available in extraordinary cases to correct a manifest injustice. *State v. Smith*, 49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1977); *State v. Sneed*, 8th Dist. Cuyahoga No. 80902, 2002-Ohio-6502. We review the trial court’s decision under an abuse of discretion standard. *Smith* at 264. Further, the doctrine of res judicata has been applied in a motion to withdraw a guilty plea to bar the assertion of claims that were or could have been raised on appeal. *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶ 59.

{¶6} “Res judicata prevents repeated attacks on a final judgment and applies to all issues that were or might have been litigated.” *Sneed* at ¶ 16, citing *State v. Brown*, 8th Dist. Cuyahoga No. 84322, 2004-Ohio-6421. The Ohio Supreme Court has explained:

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 an appeal from that judgment.

(Emphasis deleted.) *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus.

{¶7} In this case, Spann’s competency was addressed by the trial court before his final conviction. On September 10, 2008, pursuant to R.C. 2945.371, the trial court referred Spann to the court’s psychiatric clinic for evaluation. At the change of plea hearing, and before pleading guilty, Spann stipulated to the resulting psychiatric report. Any incongruities in the trial court’s handling of the referral and reporting process could have been addressed on his direct appeal. Spann did not file that appeal, but that failure does not allow Spann to circumvent the doctrine of res judicata. Accordingly, the trial court’s decision denying Spann’s motion to withdraw his guilty plea based on his mental competency is correct. Spann is prohibited from challenging the issues that should have been raised in a direct appeal. The first and second assigned errors are overruled.

{¶8} In his fourth and fifth assignments of error,<sup>2</sup> Spann claims the trial court erred by failing to transmit the trial transcript and other records for his current appeal, and by failing to appoint appellate counsel. Spann's claims are without merit.

{¶9} The trial court is not responsible for transmitting the record for appeal, and Spann is not entitled to appellate counsel in a postconviction proceeding. The burden of ensuring the transmission of the entire record necessary to dispose of the assigned errors rests solely on the appellant. App.R. 9; *State v. Howell*, 3d Dist. Union Nos. 14-2000-22 and 14-2000-23, 2000-Ohio-1933. It should be noted, except for the transcript of his sentencing proceedings that does not exist, the record was transmitted for the current appeal. And finally, convicted offenders are not constitutionally entitled to counsel in pursuance of postconviction remedies outside the direct appeal. *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, 818 N.E.2d 1157, ¶ 22, 25; *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). Spann's fourth and fifth assignments of error are overruled.

{¶10} Finally, in his third assignment of error, Spann claims that the imperfect imposition of postrelease control rendered that portion of his final conviction void. The

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<sup>2</sup>In his reply brief, Spann argues for the first time that his trial counsel was ineffective. We will not address this claim as raised for the first time on appeal, and in a reply brief. *State v. Quartermann*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, citing *United States v. Morgan*, 384 F.3d 1, 8 (1st Cir.2004); *United States v. Kamper*, 748 F.3d 728, 745 (6th Cir.2014); *United States v. Birtle*, 792 F.2d 846, 848 (9th Cir.1986); and *Eberle v. Anaheim*, 901 F.2d 814, 818 (9th Cir.1990).

final entry mentions the mandatory term of postrelease control, but not the consequences for any violation. *State v. Rice*, 8th Dist. Cuyahoga No. 95100, 2011-Ohio-1929 (the imposition of postrelease control is void if the sentencing entry fails to incorporate the consequences for a violation).

{¶11} The state conceded this error. The transcript of the sentencing hearing, however, was not included in the record on appeal, and Spann has not filed a statement pursuant to App.R. 9(C) or (D). We must presume regularity in the trial court's sentencing proceedings. *State v. Bojar*, 8th Dist. Cuyahoga No. 66657, 1995 Ohio App. LEXIS 239 (Jan. 26, 1995). As a result, we must presume the trial court properly notified Spann of the consequences of violating postrelease control, but simply omitted that from the final entry of conviction. *State v. McGee*, 8th Dist. Cuyahoga No. 101307, 2014-Ohio-5289. In *McGee*, a panel of this court held that the presumption of regularity doctrine precludes a reversal for a new sentencing hearing in situations where the offender is currently serving his sentence and fails to include a transcript of the sentencing hearing in challenging the imperfect imposition of postrelease control. Spann is currently incarcerated as a result of both his sentences. As a result, we find merit to his third assignment of error, but remand for the sole purpose of issuing a nunc pro tunc correction of the final judgment of conviction. Spann's third assignment of error is sustained in part, and the case is remanded.

{¶12} The decision of the trial court is affirmed in part and reversed in part. The case is remanded to the lower court for the limited purpose of issuing a nunc pro tunc correction of the final judgment of conviction.

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.

SEAN C. GALLAGHER, JUDGE

MARY J. BOYLE, P.J., and  
ANITA LASTER MAYS, J., CONCUR