

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 24983

Appellee

v.

KENNETH O. GREENLEAF

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 01 10 2563

Appellant

DECISION AND JOURNAL ENTRY

Dated: June 23, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Kenneth Greenleaf pleaded guilty to unlawful sexual conduct with a minor and rape. The trial court sentenced him to nine years in prison. On appeal, this Court vacated his sentence. After the trial court resentenced Mr. Greenleaf, this Court remanded his case again so that the trial court could advise him of the possible penalties for violating post-release control. In July 2009, Mr. Greenleaf moved to withdraw his guilty plea and vacate his void sentence. The trial court granted his motion to vacate because it had not properly imposed post-release control. Following a hearing, the court denied his motion to withdraw his guilty plea. Mr. Greenleaf has appealed, arguing that the court incorrectly denied his motion to withdraw his guilty plea. This Court reverses because the trial court should have permitted Mr. Greenleaf to withdraw his plea as a matter of law.

MOTION TO WITHDRAW PLEA

{¶2} Mr. Greenleaf’s assignment of error is that the trial court incorrectly denied his motion to withdraw his guilty plea. “A motion to withdraw a plea of guilty . . . may be made only before sentence is imposed; but 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.” Crim. R. 32.1. In *State v. Boswell*, 121 Ohio St. 3d 575, 2009-Ohio-1577, the Ohio Supreme Court held that “[a] motion to withdraw a plea of guilty . . . made by a defendant who has been given a void sentence must be considered as a presentence motion under Crim.R. 32.1.” *Id.* at syllabus. “[A] presentence motion to withdraw a guilty plea should be freely and liberally granted.” *Id.* at ¶1 (quoting *State v. Xie*, 62 Ohio St. 3d 521, 527 (1992)). The defendant, however, has the burden of demonstrating a reasonable and legitimate basis for withdrawing his plea. *State v. Razo*, 9th Dist. 08CA009509, 2009-Ohio-3405, at ¶12.

{¶3} In July 2009, Mr. Greenleaf moved to vacate his sentence, arguing that the trial court did not properly impose post-release control. He also moved to withdraw his guilty plea. The trial court granted his motion to vacate. Regarding his motion to withdraw, the court wrote that it would treat the motion as a presentence motion and scheduled an evidentiary hearing on the motion.

{¶4} Before the hearing, Mr. Greenleaf filed a memorandum, arguing that the court should grant his motion to withdraw his plea under *State v. Veney*, 120 Ohio St. 3d 176, 2008-Ohio-5200, because the trial court did not advise him, before accepting his plea, that he had the right to a jury trial. At the hearing, Mr. Greenleaf’s lawyer told the court that he did not “believe that we need to put any evidence on since in my hearing memorandum I specified the grounds” The court asked the lawyer whether he wanted “to repeat any of those for the record.” The

lawyer answered that, “at the plea hearing this Court failed to inform Mr. Greenleaf of his constitutional right to a jury trial.” He argued that, in *Veney*, the Ohio Supreme Court “made it very clear that all of those constitutional rights must be clearly spelled out in order to establish a knowing, voluntary, and intelligent plea” The lawyer said that he did not think it was necessary for him to call Mr. Greenleaf as a witness because “the transcripts have to show clearly that the Court engaged in the required dialogue.” The trial court denied Mr. Greenleaf’s motion, however, “[b]ased on the fact that [he] [did] not wish to put on any evidence as it relates to the hearing”

{¶5} The State has argued that this Court should not reach the merits of Mr. Greenleaf’s appeal because he could have challenged the constitutionality of his plea in his first appeal to this Court. “Under the doctrine of *res judicata*, a final judgment of conviction bars a . . . 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 . . . on an appeal from that judgment.” *State v. Perry*, 10 Ohio St. 2d 175, paragraph nine of the syllabus (1967).

{¶6} The State has cited *State ex rel. Special Prosecutors v. Judges of Belmont County Court of Common Pleas*, 55 Ohio St. 2d 94 (1978), in support of its argument. In *Special Prosecutors*, the defendant pleaded guilty to murder. After the court of appeals affirmed his conviction, the defendant moved to withdraw his plea, which the trial court granted. The State did not appeal, but, before the defendant’s case could proceed to trial, it filed a complaint for a writ of prohibition, seeking to prevent the trial from taking place. The State argued that the trial court had not had jurisdiction to let the defendant withdraw his plea. The Supreme Court granted the writ because it concluded that a trial court does not have jurisdiction to consider a motion to

withdraw a plea after an appellate court has affirmed the defendant's conviction. *Id.* at 98. The Supreme Court noted that "the trial court lost its jurisdiction when the appeal was taken, and, absent a remand, it did not regain jurisdiction subsequent to the Court of Appeals' decision." *Id.* at 97.

{¶7} The State has also cited *State v. McGee*, 8th Dist. No. 91638, 2009-Ohio-3374, in support of its argument. In *McGee*, the defendant pleaded guilty to rape and gross sexual imposition and the Eighth District affirmed his convictions. Several years later, Mr. McGee moved to vacate his plea, arguing that he had not been told that he would be subject to a mandatory term of post-release control at the time he entered his plea. The Eighth District concluded that his argument was barred by the doctrine of res judicata because he could have raised it on direct appeal. *Id.* at ¶12. It noted that, in *State v. Boswell*, 121 Ohio St. 3d 575, 2009-Ohio-1577, at ¶11, the Ohio Supreme Court did not consider whether the doctrine of res judicata applied because the State had not properly raised that issue. *McGee*, 2009-Ohio-3374, at ¶16.

{¶8} Before the doctrine of res judicata can apply, there must be "a final judgment of conviction." *State v. Perry*, 10 Ohio St. 2d 175, paragraph nine of the syllabus (1967). In *State v. McGee*, 8th Dist. No. 91638, 2009-Ohio-3374, the Eighth District recognized that the trial court's original judgment was a nullity because it did not mention post-release control. *Id.* at ¶8 (citing *State v. McGee*, 8th Dist. No. 89133, 2007-Ohio-6655, at ¶16). It also recognized that "principles of res judicata do not apply to void sentences because, by definition, a void sentence means that no final judgment of conviction has been announced." *Id.* It applied the doctrine of res judicata anyway because that is what had been done in other cases in which a defendant had attempted to withdraw his plea after a direct appeal. *Id.* at ¶9 (citing *State v. Robinson*, 8th Dist.

No. 85266, 2005-Ohio-4154, at ¶11; *State v. Totten*, 10th Dist. Nos. 05AP-278, 05AP-508, 2005-Ohio-6210, at ¶9). It ignored the fact that there was a final judgment of conviction in those other cases and in *Special Prosecutors*.

{¶9} The Eighth District also cited its decision in *State v. Craddock*, 8th Dist. No. 87582, 2006-Ohio-5915, in support of its decision. *State v. McGee*, 8th Dist. No. 91638, 2009-Ohio-3374, at ¶11. According to *Craddock*, *Special Prosecutors* “specifically held that a trial court does not have jurisdiction, upon remand, to entertain a Crim.R. 32.1 motion to withdraw a plea after a judgment of conviction has been affirmed by the appellate court.” *Craddock*, 2006-Ohio-5915, at ¶8. In *Special Prosecutors*, however, the Ohio Supreme Court actually concluded “that the trial court lost its jurisdiction when the appeal was taken, and, absent a remand, it did not regain jurisdiction subsequent to the Court of Appeals’ decision.” *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St. 2d 94, 97 (1978). In *Special Prosecutors*, the Supreme Court did not consider whether a trial court could consider a Rule 32.1 motion “upon remand,” as purported by the Eighth District in *Craddock*. *Craddock*, 2006-Ohio-5915, at ¶8. This Court, therefore, does not consider *McGee* or *Craddock* persuasive authority.

{¶10} Mr. Greenleaf’s motion to withdraw his guilty plea is not barred by the doctrine of res judicata under *State ex rel. Culgan v. Medina County Court of Common Pleas*, 119 Ohio St. 3d 535, 2008-Ohio-4609, and *State v. Harmon*, 9th Dist. No. 24495, 2009-Ohio-4512. In *Culgan*, the trial court convicted Mr. Culgan of several offenses, but did not set forth his plea in its judgment entry or the findings on which his convictions were based. This Court affirmed his convictions on appeal. Four years later, Mr. Culgan moved for resentencing because the trial court’s judgment entry did not comply with Rule 32(C) of the Ohio Rules of Criminal Procedure. After the trial court denied his motion, Mr. Culgan filed for writs of mandamus and procedendo.

{¶11} The Ohio Supreme Court noted that, if a judgment entry does not comply with Rule 32(C), it is “nonappealable.” *State ex rel. Culgan v. Medina County Court of Common Pleas*, 119 Ohio St. 3d 535, 2008-Ohio-4609, at ¶9. The Supreme Court concluded that, because the trial court’s judgment entry did not comply with Rule 32(C), it was not a final, appealable order. *Id.* at ¶10. Accordingly, it granted Mr. Culgan’s writs of mandamus and procedendo to compel the common pleas court to issue a sentencing entry that complied with Rule 32(C). *Id.* at ¶11.

{¶12} In *State v. Harmon*, 9th Dist. No. 24495, 2009-Ohio-4512, a jury found Mr. Harmon guilty of engaging in a pattern of corrupt activity and drug trafficking. This Court affirmed his convictions on appeal. A few years later, the trial court resentenced Mr. Harmon because his original sentence was void in that it did not correctly impose post-release control. On appeal from the new sentence, Mr. Harmon attempted to raise an issue regarding his trial that he could have raised in his first appeal. *Id.* at ¶3-4. This Court examined *Culgan* and concluded that “[t]he implication of the Supreme Court’s opinion in *Culgan* is that regardless of whether a defendant has already appealed his conviction, if the order from which the first appeal was taken is not final and appealable, he is entitled to a new sentencing entry which can itself be appealed.” *Id.* at ¶6. Because Mr. Harmon’s original sentencing entry did not properly impose post-release control, this Court determined that it was not a final appealable order. *Id.* at ¶8. This Court, therefore, considered Mr. Harmon’s new assignment of error on the merits, notwithstanding his earlier appeal. *Id.* at ¶9.

{¶13} As previously noted in this opinion, the doctrine of res judicata can not apply until there is “a final judgment of conviction.” *State v. Perry*, 10 Ohio St. 2d 175, paragraph nine of the syllabus (1967). As in *Harmon*, the trial court’s sentencing entry in this case was not a final

judgment because it did not properly impose post-release control. *State v. Harmon*, 9th Dist. No. 24495, 2009-Ohio-4512, at ¶8. The doctrine of res judicata, therefore, can not apply to the appeals Mr. Greenleaf took from the void judgment. The State’s argument that Mr. Greenleaf’s motion is barred by the doctrine of res judicata is without merit.

{¶14} Regarding the merits of Mr. Greenleaf’s assignment of error, this Court notes that, in *State v. Veney*, 120 Ohio St. 3d 176, 2008-Ohio-5200, the Ohio Supreme Court held that “[a] trial court must strictly comply with Crim.R. 11(C)(2)(c) and orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial, (2) the right to confront one’s accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination.” *Id.* at syllabus. It further held that, “[if] a trial court fails to strictly comply with this duty, the defendant’s plea is invalid.” *Id.* Applying that decision, this Court concluded in *State v. Gardner*, 9th Dist. No. 08CA009520, 2009-Ohio-6505, that, if a trial court has not strictly complied with the constitutionally required parts of Rule 11(C)(2)(c) of the Ohio Rules of Criminal Procedure, the defendant is entitled to withdraw his plea. *Id.* at ¶4.

{¶15} The trial court did not tell Mr. Greenleaf that he was entitled to a jury trial before accepting his guilty plea. Accordingly, it should have permitted him to withdraw his plea as a matter of law. *State v. Gardner*, 9th Dist. No. 08CA009520, 2009-Ohio-6505, at ¶4. Mr. Greenleaf’s assignment of error is sustained.

CONCLUSION

{¶16} The trial court incorrectly denied Mr. Greenleaf’s motion to withdraw his guilty plea. The judgment of the Summit County Common Pleas Court is reversed, and this cause is

remanded for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellee.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶17} Although I understand that the majority’s reasoning reflects a natural extension of the Supreme Court of Ohio precedent, I respectfully dissent. The issue presented in this case is similar to the issue which is currently before the Supreme Court of Ohio in *State v. Fischer*, 123

Ohio St.3d 1410. Until we receive further guidance from the Supreme Court, I would hold that the high court's ruling *Special Prosecutors v. Judges of Belmont Co. Court of Common Pleas* (1978), 55 Ohio St.2d 94 is controlling in this matter. See, also, *State v. Holloway*, 8th Dist. No. 91005, 2009-Ohio-35. Thus, the trial court was without authority to entertain Greenleaf's motion to withdraw his plea after he had failed to raise the issue in his prior appeals.

{¶18} There are inherent problems with permitting an offender to withdraw his plea when he did not raise that issue on direct appeal. Here, Greenleaf pleaded guilty to rape, a felony of the first degree, and unlawful sexual conduct with a minor, a felony of the third degree in January 2002. He was sentenced to a total of nine years in prison. On direct appeal, Greenleaf did not raise an issue relating to a defect in the plea colloquy. This Court vacated the sentence for rape on the basis that the trial court did not make the findings necessary to impose more than a minimum sentence. *State v. Greenleaf*, 9th Dist. No. 21016, 2002-Ohio-5256, ¶5. Greenleaf was sentenced again by entry dated November 15, 2002. Greenleaf again appealed to this Court but, again, did not challenge the validity of his plea. This Court again remanded because the sentencing entry did not contain the possible penalties for violation of post-release control. *State v. Greenleaf*, 9th Dist. No. 21370, 2003-Ohio-5901, ¶8. Subsequently, on July 27, 2009, Greenleaf filed pro-se motions to vacate the guilty pleas, vacate the void sentence, and for re-sentencing. The life of a criminal case in which a defendant has admitted guilt must be subject to some temporal limit.

{¶19} The life of a criminal case in which a defendant has admitted guilt and twice appealed only his sentence must be subject to some temporal limit. Permitting an offender to withdraw his plea almost a decade after admitting his guilt undermines the societal interest in allowing victims of traumatic crimes to obtain closure. The Ohio Constitution guarantees

victims of crimes a number of significant rights, including the right to notice of proceedings. The victims in this case will be forced to relive the tragic events that Greenleaf already admitted, either at trial or during a new plea proceeding. I recognize that the majority's decision follows from the Ohio Supreme Court's recent line of postrelease control decisions. I hope the Court takes the opportunity in *Fischer* to decide that improper postrelease control notifications create voidable, rather than void, judgments.

APPEARANCES:

NICHOLAS SWYRYDENKO, attorney at law, for appellant.

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