

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 25024

Appellee

v.

JOHN M. BAKER

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 02 06 1500

Appellant

DECISION AND JOURNAL ENTRY

Dated: September 15, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} John Baker pleaded guilty to aggravated vehicular homicide, aggravated vehicular assault, and driving under the influence of alcohol. The trial court sentenced him to ten years in prison. Two years later, he moved to withdraw his plea. The trial court denied his motion, and this Court affirmed that decision. In 2009, he moved for relief from judgment, arguing that the trial court had not told him about post-release control at his sentencing hearing. The State agreed that Mr. Baker's sentence was void and requested that the trial court resentence him. Before he was resentenced, Mr. Baker moved again to withdraw his plea. The trial court denied his motion, concluding the relief he sought was barred under *State v. McGee*, 8th Dist. No. 91638, 2009-Ohio-3374. It resentenced him to ten years in prison. Mr. Baker has appealed the denial of his motion to withdraw his plea. This Court reverses under *State v. Harmon*, 9th Dist. No. 24495, 2009-Ohio-4512, and *State v. Greenleaf*, 9th Dist. No. 24983, 2010-Ohio-2863, and

remands for the trial court to determine whether Mr. Baker should be permitted to withdraw his guilty plea.

MOTION TO WITHDRAW PLEA

{¶2} Mr. Baker’s first assignment of error is that the trial court incorrectly denied his motion to withdraw his plea. The trial court denied his motion under *State v. McGee*, 8th Dist. No. 91638, 2009-Ohio-3374. The State has argued that the trial court’s decision was correct under *State ex rel. Special Prosecutors v. Judges of Belmont County Court of Common Pleas*, 55 Ohio St. 2d 94 (1978).

{¶3} “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 (quoting *State v. DeWille*, 9th Dist. No. 2101, 1992 WL 323896 at *1 (Nov. 4, 1992)).

{¶4} In *State v. McGee*, 8th Dist. No. 91638, 2009-Ohio-3374, Mr. McGee pleaded guilty to rape and gross sexual imposition and the Eighth District upheld his convictions. Several years later, the Eighth District vacated Mr. McGee’s sentence because the trial court had not told him about post-release control at his sentencing hearing. On remand, Mr. McGee moved

to vacate his plea, arguing that he had not been told about post-release control at the time he entered it. 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. The court distinguished *State v. Boswell*, 121 Ohio St. 3d 575, 2009-Ohio-1577, because the Ohio Supreme Court had not considered whether the doctrine of res judicata applied in that case. *McGee*, 2009-Ohio-3374, at ¶16.

{¶5} In *State ex rel. Special Prosecutors v. Judges of Belmont County Court of Common Pleas*, 55 Ohio St. 2d 94 (1978), the defendant pleaded guilty to murder. After the court of appeals affirmed his conviction, he 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. It held that Rule 32.1 of the Ohio Rules of Criminal Procedure “does not vest jurisdiction in the trial court to maintain and determine a motion to withdraw the guilty plea subsequent to an appeal and an affirmance by the appellate court.” *Id.*

{¶6} 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 trafficking in cocaine, and this Court affirmed his convictions. A few years later, the trial court resentenced him because it had not told him about post-release control during his sentencing hearing. Mr. Harmon appealed his

new sentence, attempting to argue that the trial court had made mistakes during his trial. The State argued that he could only raise errors arising out of the resentencing. This Court held 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. It concluded that Mr. Harmon could challenge the merits of his conviction, notwithstanding his previous direct appeal. *Id.* at ¶9.

{¶7} In *State v. Greenleaf*, 9th Dist. No. 24983, 2010-Ohio-2863, Mr. Greenleaf pleaded guilty to rape and unlawful sexual conduct with a minor. The trial court sentenced him to nine years in prison. On appeal, this Court vacated his sentence. After the trial court resentenced him, this Court remanded his case again so that the trial court could advise him of the possible penalties for violating post-release control. During the second remand, 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 appealed the denial of his motion to withdraw.

{¶8} On appeal, the State argued that this Court should uphold the trial court’s decision because it had not had jurisdiction to consider Mr. Greenleaf’s motion to withdraw under *Special Prosecutors* and *McGee*. *State v. Greenleaf*, 9th Dist. No. 24983, 2010-Ohio-2863, at ¶6-7. This Court rejected its arguments. We distinguished *Special Prosecutors* because, unlike the facts of that case, we had remanded Mr. Greenleaf’s case to the trial court. *Id.* at ¶9. We declined to follow *McGee* because we recognized that res judicata does not apply unless there is “a final judgment of conviction.” *Id.* at ¶9, 13 (quoting *State v. Perry*, 10 Ohio St. 2d 175, paragraph nine of the syllabus (1967)). Instead, applying *Harmon*, we concluded that “[t]he doctrine of res

judicata . . . can not apply to the appeals Mr. Greenleaf took from the void judgment.” *Id.* at ¶13. We, therefore, reached the merits of the appeal. *Id.* at ¶15.

{¶9} The trial court sentenced Mr. Baker in 2002. In 2004, he moved to withdraw his plea. The trial court denied his motion, and this Court affirmed its decision. *State v. Baker*, 9th Dist. No. 22293, 2005-Ohio-991, at ¶4, 29. In 2009, Mr. Baker moved for relief from judgment, arguing that his sentence was void. The State agreed that Mr. Baker’s sentence was void and moved for resentencing. The trial court, therefore, had jurisdiction over this action, unlike in *Special Prosecutors*. Furthermore, because the doctrine of res judicata does not apply to appeals taken from a void judgment, it does not bar Mr. Baker’s motion to withdraw his plea. See *State v. Greenleaf*, 9th Dist. No. 24983, 2010-Ohio-2863, at ¶13. The trial court incorrectly concluded that Mr. Baker’s motion is barred under *State v. McGee*, 8th Dist. No. 91638, 2009-Ohio-3374. Mr. Baker’s assignment of error is sustained.

CONCLUSION

{¶10} The trial court incorrectly concluded that Mr. Baker’s motion to withdraw his plea was barred by the doctrine of res judicata. The judgment of the Summit County Common Pleas Court is reversed, and this matter is remanded for the trial court to determine whether Mr. Baker has demonstrated a reasonable and legitimate basis for withdrawing his plea. See *State v. Razo*, 9th Dist. 08CA009509, 2009-Ohio-3405, at ¶12.

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

MOORE, J.
BAIRD, J.
CONCUR

(Baird, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to §6(C), Article IV, Constitution.)

APPEARANCES:

DONALD R. HICKS, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and RICHARD S. KASAY, assistant prosecuting attorney, for appellee.