

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. Nos. 25353
 25355

Appellee

v.

JESS R. BROWN

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 05 12 4604

Appellant

DECISION AND JOURNAL ENTRY

Dated: March 9, 2011

DICKINSON, Presiding Judge

INTRODUCTION

{¶1} Jess Brown pleaded guilty to multiple counts of operating under the influence and driving with a suspended license. He also pleaded guilty to one count each of possession of marijuana, negligent assault, and failure to stop at a stop sign and to an enhancement specification that he had been convicted 5 or more times in the previous 20 years of operating under the influence. On the day of sentencing, he moved to withdraw his pleas. The trial court denied his motion and sentenced him to 16 1/2 years in prison with a mandatory period of 5 years of post-release control. This Court affirmed his convictions. Mr. Brown then moved the trial court to vacate his sentence as void due to improper imposition of post-release control. He also filed a second motion to withdraw his guilty plea. The trial court denied his second motion to withdraw his plea and held a resentencing hearing at which it reimposed the original sentence with a discretionary period of three years of post-release control. Mr. Brown has appealed,

arguing that the trial court incorrectly denied his second motion to withdraw and that he was denied effective assistance of counsel. We affirm because Mr. Brown's assigned errors are barred by res judicata.

BACKGROUND

{¶2} Mr. Brown pleaded guilty to multiple counts of operating under the influence and driving with a suspended license. He also pleaded guilty to one count each of possession of marijuana, negligent assault, and failure to stop at a stop sign and to an enhancement specification that he had been convicted 5 or more times in the previous 20 years of operating under the influence. The trial court sentenced him to 16 1/2 years in prison, along with a mandatory 5 years of post-release control. Mr. Brown appealed, assigning as errors that his plea was not made knowingly, voluntarily, and intelligently, and that the trial court incorrectly denied his motion to withdraw his guilty plea. In support of both assigned errors, he argued that he received ineffective assistance of counsel. This Court overruled both assignments of error, concluding that Mr. Brown's "counsel was constitutionally effective and did not negatively affect the knowing and voluntary nature of [his] guilty plea." *State v. Brown*, 9th Dist. No. 23759, 2007-Ohio-7028, at ¶12 (quoting *State v. Jeter*, 6th Dist. No. E-06-054, 2007-Ohio-6127, at ¶9).

{¶3} Mr. Brown then moved the trial court to vacate his sentence, arguing that it was void. The State moved for resentencing. Before the resentencing hearing, Mr. Brown filed a second motion to withdraw his guilty plea. The trial court held a hearing on the motion to withdraw and denied it. It then resentenced him to 16 1/2 years imprisonment and to a discretionary 3 years of post-release control.

RES JUDICATA

{¶4} Mr. Brown’s first assignment of error is that the trial court incorrectly denied his second motion to withdraw his plea. His second assignment of error is that he received ineffective assistance of counsel at the time he pleaded guilty. In support of both assigned errors, Mr. Brown has argued that, while count one of his indictment charged him with having been convicted three times of operating under the influence in the preceeding six years, he in fact had not been. He has asserted that his lawyers were incompetent for allowing him to plead guilty to that count.

{¶5} This is Mr. Brown’s second appeal. The Ohio Supreme Court recently held that, “[a]lthough the doctrine of res judicata does not preclude review of a void sentence, res judicata still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence.” *State v. Fischer*, ___ Ohio St. 3d ___, 2010-Ohio-6238, at paragraph three of the syllabus. “[W]hen a judge fails to impose statutorily mandated post-release control as part of a defendant’s sentence, that part of the sentence . . . is void and must be set aside.” *Id.* at ¶26. Since Mr. Brown was sentenced after the effective date of Section 2929.19.1 of the Ohio Revised Code, Section 2929.19.1 provides the method for correcting his sentence. *State v. Singleton*, 124 Ohio St. 3d 173, 2009-Ohio-6434, at ¶35. From the language of Section 2929.19.1, “the General Assembly appears to have intended to leave undisturbed the sanctions imposed upon the offender that are unaffected by the court’s failure to properly impose post-release control at the original sentencing.” *Id.* at ¶24.

{¶6} As only the post-release control part of Mr. Brown’s sentence was void, this is Mr. Brown’s second appeal from the same convictions. As in *State v. Ketterer*, 126 Ohio St. 3d 448, 2010-Ohio-3831, Mr. Brown has already had a direct appeal, and this Court affirmed his

convictions. “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.” *Ketterer*, 2010-Ohio-3831, at ¶59 (citing *State v. Perry*, 10 Ohio St. 2d 175, paragraph nine of the syllabus (1967)). This prohibition extends to claims made in support of motions to withdraw a plea. *Id.* (citing *State v. McGee*, 8th Dist. No. 91638, 2009-Ohio-3374, at ¶9; *State v. Totten*, 10th Dist. No. 05AP-278 & 05AP-508, 2005-Ohio-6210, at ¶7). Mr. Brown could have raised his arguments on his first appeal. Therefore, they are barred by res judicata.

{¶7} Further, regarding his motion to withdraw, “[Rule] 32.1 [of 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. While [Rule] 32.1 apparently enlarges the power of the trial court over its judgments without respect to the running of the court term, it does not confer upon the trial court the power to vacate a judgment which has been affirmed by the appellate court, for this action would affect the decision of the reviewing court, which is not within the power of the trial court to do.” *State v. Ketterer*, 126 Ohio St. 3d 448, 2010-Ohio-3831, at ¶61 (quoting *State ex rel Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St. 2d 94, 97-98 (1978)).

{¶8} On his previous appeal, this Court concluded that Mr. Brown received effective assistance of counsel and affirmed his convictions. Under *Special Prosecutors*, 55 Ohio St. 2d 94 (1978), the trial court did not have jurisdiction to grant his second motion to withdraw his guilty plea. Further, all the arguments made by Mr. Brown in support of his assigned errors could have been raised on his first appeal and, therefore, are barred by res judicata. Accordingly, his assignments of error are overruled.

CONCLUSION

{¶9} The trial court lacked jurisdiction to grant Mr. Brown's second motion to withdraw his guilty plea. Further, both of Mr. Brown's assignments of error are barred by res judicata. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

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 appellant.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
CONCURS

BELFANCE, J.

CONCURS IN JUDGMENT ONLY, SAYING:

{¶10} I concur in the judgment. In his first appeal, Mr. Brown challenged the trial court's denial of his motion to withdraw his guilty plea and this Court affirmed his conviction. It does not appear that Mr. Brown appealed this Court's determination that his plea was not defective. Accordingly, Mr. Brown may not mount a second challenge to his plea.

APPEARANCES:

CHRISTOPHER R. SNYDER, attorney at law, for appellant.

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