

[Cite as *State v. Fountain*, 2010-Ohio-1202.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**Nos. 92772 and 92874**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**LEVALE FOUNTAIN**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case Nos. CR-406086, CR-424030, and CR-401853

**BEFORE:** Gallagher, A.J., Blackmon, J., and Boyle, J.

**RELEASED:** March 25, 2010

**JOURNALIZED:**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

SEAN C. GALLAGHER, A.J.:

{¶ 1} This is a consolidated appeal. Appellant, Leavale Fountain, challenges the decision of the Cuyahoga County Court of Common Pleas to deny his motion to withdraw his guilty plea and the sentence he received after his original sentence was deemed void. For the reasons stated herein, we affirm.

{¶ 2} On August 6, 2002, Fountain entered into a plea agreement involving three cases, Cuyahoga County Court of Common Pleas Case Nos. CR-401853, CR-406086, and CR-424030. He entered a plea of guilty to several drug charges and was sentenced to a total prison term of nine years. The trial court advised Fountain that he “may” be subject to postrelease control upon his release from prison.

{¶ 3} On September 11, 2008, Fountain filed a pro se motion to correct a void sentence on the basis that he was not properly informed of postrelease control. On November 26, 2008, Fountain filed a pro se motion to withdraw his guilty plea.

{¶ 4} The trial court conducted a hearing on January 15, 2009, on both motions. The trial court considered the motion to withdraw the guilty plea and denied the motion. Defense counsel argued that Fountain may not have pled guilty had he known of the mandatory nature of postrelease control. The trial court reviewed the transcript of the plea hearing and discredited Fountain’s argument.

{¶ 5} The trial court granted the motion to correct the void sentence. The court sentenced Fountain to a total prison term of nine years and properly informed Fountain of postrelease control. Although Fountain argued for a lesser sentence, the trial court determined that it did not have the authority to impose a sentence other than what was agreed to with the plea bargain.

{¶ 6} Fountain filed two separate appeals that have been consolidated and present a total of three assignments of error for our review.

{¶ 7} We first address the two assignments of error that relate to the motion to withdraw guilty plea. Fountain argues that the trial court failed to conduct a hearing and erred in denying his motion. We find that Fountain's arguments are barred by the doctrine of res judicata.

{¶ 8} In *State v. Boswell*, 121 Ohio St.3d 575, 576, 2009-Ohio-1577, 906 N.E.2d 422, the Ohio Supreme Court held that a motion to withdraw a guilty plea filed after the imposition of a void sentence must be considered as a presentence motion under Crim.R. 32.1 and be freely and liberally granted. The court remanded the matter to the trial court to ensure consideration of the motion to withdraw as a presentence motion. However, the court did not address the impact of res judicata on issues raised in such a motion.

{¶ 9} It is well recognized that the doctrine of res judicata bars claims that were raised or could have been raised on direct appeal. *State v. Davis*, 119 Ohio St.3d 422, 2008-Ohio-4608, 894 N.E.2d 1221. Consistent therewith, this court has consistently recognized that the doctrine of res judicata bars all claims

raised in a Crim.R. 32.1 motion that were raised or could have been raised in a prior proceeding, including a direct appeal. *State v. McGee*, Cuyahoga App. No. 91638, 2009-Ohio-3374; *State v. Pickens*, Cuyahoga App. No. 91924, 2009-Ohio-1791; *State v. Gaston*, Cuyahoga App. No. 82628, 2003-Ohio-5825; see, also, *State v. Coats*, Mercer App. Nos. 10-09-04 and 10-09-05, 2009-Ohio-3534. Indeed, the right to withdraw a plea is not absolute. *Coats*, supra. Applying these same principles, we find that the application of res judicata to a motion to withdraw is not impacted by a void sentence. *Coats*, supra; *McGee*, supra.

{¶ 10} We find instructive *Newman v. Wilson* (Apr. 30, 2009), N.D. Ohio No. 5:08 CV 483, a case in which a motion to withdraw guilty plea was filed after the sentence was vacated and the case remanded for resentencing, wherein the court stated as follows: “The doctrine of res judicata bars further litigation in a criminal case of issues which were raised previously or could have been raised previously in a direct appeal. *State v. Leek*, Cuyahoga App. No. 74338, 2000 Ohio App. Lexis 2909, citing *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus. Accordingly, [the defendant’s] failure to properly raise the plea issues in [a] direct appeal \* \* \* bars \* \* \* later consideration. \* \* \* In this case, \* \* \* res judicata would have served to bar further review of petitioner’s claims of involuntary guilty plea.”

{¶ 11} In this matter, Fountain contends that his plea was not voluntary because the trial court misinformed him at his plea hearing that he may receive,

rather than that he would receive, postrelease control. However, Fountain could have raised that issue on direct appeal. Therefore, his motion is barred by res judicata and we overrule his assigned errors pertaining to his motion to withdraw.

{¶ 12} Fountain's final assignment of error challenges the trial court's determination that it did not have the authority to impose a sentence other than what was agreed to in the plea bargain.

{¶ 13} The decision whether to accept or to reject a plea bargain rests within the sound discretion of the trial court. *State v. Asberry*, 173 Ohio App.3d 443, 2007-Ohio-5436, 878 N.E.2d 1082. The trial judge imposed a total sentence of nine years, consistent with the term Fountain agreed to in the plea bargain. Although the trial judge indicated that if it were up to him he would impose a shorter sentence, the trial judge imposed the sentence agreed to in the original plea deal that had been accepted by the court. We find no error in the trial court's determination to impose a sentence consistent with the plea bargain. Fountain's final assignment of error is overruled.

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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

PATRICIA A. BLACKMON, J., and  
MARY J. BOYLE, J., CONCUR