

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93936

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL TATE

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-367475

BEFORE: Jones, J., Rocco, P.J., and Blackmon, J.

RELEASED: May 27, 2010

**JOURNALIZED:
FOR APPELLANT**

Michael Tate, Pro Se
Inmate No. 367-937
Grafton Correctional Institution
1800 S. Avon Belden Road
Grafton, Ohio 44044

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Thorin Freeman
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

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).

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Michael Tate (“Tate”), appeals the trial court’s denial of his motion to withdraw his guilty plea. Finding no merit to the appeal, we affirm the court’s decision.

{¶ 2} In 1998, Tate pled guilty to felonious assault and robbery. The trial court sentenced him to sixteen years in prison. In 2006, Tate moved to file a delayed appeal, which we denied. *State v. Tate*, Cuyahoga App. No. 88930, discretionary appeal not allowed by *State v. Tate*, 113 Ohio St.3d 1417, 2007-Ohio-1036, 862 N.E.2d 845.

{¶ 3} In May 2009, Tate moved to have his guilty plea withdrawn, arguing that he had not been properly advised of postrelease control. The trial court denied his motion. Tate filed a pro se appeal, but we dismissed his appeal because he failed to file the record. *State v. Tate*, Cuyahoga App. No. 93511.

{¶ 4} In August 2009, Tate filed another motion to withdraw his guilty plea. The trial court denied the motion and Tate filed this instant pro se appeal, raising the following assignment of error for our review.

“I. The court erred when exceeding its authority in denying Appellant’s motion to withdraw guilty plea, pursuant to Crim.R. 32.1, when the trial court’s judgment is void pursuant to Crim.R. 11(C), and R.C. 2967.28.”

{¶ 5} Tate argues that he should be allowed to withdraw his guilty plea because the trial court failed to inform him of postrelease control during his plea hearing. The state argues that Tate’s claim is barred by res judicata because he could have raised the issue of postrelease control on direct appeal.

{¶ 6} Tate cites to the recent Ohio Supreme Court decision 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. *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, 906 N.E.2d 422. We note, however, that we have not determined that Tate's sentence was void, nor are we now able to determine whether he was properly sentenced as Tate has failed to file a transcript of his sentencing hearing. Therefore, we will presume regularity with his sentence.

{¶ 7} As to the state's argument that Tate's claim is barred by res judicata, 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. Fountain*, Cuyahoga App. Nos. 92772 and 92874, 2010-Ohio-1202; *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.

{¶ 8} Recently, we applied res judicata to a defendant's subsequent attempts to have his plea withdrawn, finding that he could have raised the issue on direct appeal and the trial court had no authority to grant the motion to withdraw since his plea had been previously affirmed on direct appeal. See *McGee*.

{¶ 9} In another recent case, the defendant argued 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. See *Fountain*. In *Fountain*, we cited a federal district court case, *Newman v. Wilson* (Apr. 30, 2009), N.D. Ohio No. 5:08 CV 483, in which a motion to withdraw guilty plea was filed after the defendant's sentence was vacated and the case remanded for resentencing. The *Newman* court found that the defendant's failure to properly raise the plea issues in a direct appeal barred later consideration and res judicata served to bar further review of his claims of involuntary guilty plea. *Id.* Drawing on the reasoning in *Newman*, we ruled that *Fountain* could have raised the issue of postrelease control on direct appeal and concluded that his motion to withdraw his guilty plea was barred by res judicata. *Fountain*.

{¶ 10} In this case, Tate failed to file a direct appeal and also failed to properly appeal the trial court's denial of his first motion to withdraw his guilty plea. Once we dismissed Tate's appeal for failure to file a record, his proper course of action would have been to file a motion for reconsideration or a motion to reinstate that appeal. Instead, he chose to file another motion to withdraw his guilty plea with the trial court. But because the trial court's denial of Tate's first motion to withdraw his guilty plea was an adjudication on the merits of his claims, was based upon the same facts, and sought the same relief as the second motion, the trial court's denial of the first motion operated under res judicata to bar the successive motion. See *State v. Jackson*, Cuyahoga App. No. 92013, 2009-Ohio-3292. Thus, because

Tate did not raise the issue of postrelease control during his plea on direct appeal or properly appeal the court's denial of his first motion, his successive motion is barred by res judicata.

{¶ 11} The sole assignment of error is overruled.

{¶ 12} Accordingly, judgment is affirmed.

It is ordered that appellee recover of 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.

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

LARRY A. JONES, JUDGE

KENNETH A. ROCCO, P.J., and
PATRICIA A. BLACKMON, J., CONCUR