

[Cite as *State v. Gross*, 2010-Ohio-3727.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93819

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

YULIAS GROSS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART;
REMANDED FOR RESENTENCING**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-375719

BEFORE: McMonagle, P.J., Stewart, J., and Cooney, J.

RELEASED AND JOURNALIZED: August 12, 2010

FOR APPELLANT

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CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Defendant-appellant, Yulias Gross, appeals from the trial court's judgment denying his motion to withdraw his guilty plea.

{¶ 2} In 1999, Gross, then 18 years of age, lured a 12-year-old mentally impaired girl to his house under the pretense of watching television. Instead, he raped her, severely injuring her genital area and causing her significant emotional trauma.

{¶ 3} The state of Ohio charged Gross with one count each of rape, kidnapping, and gross sexual imposition. Pursuant to a plea bargain in

which the State dropped several specifications and reduced the kidnapping charge, Gross subsequently pled guilty to rape, abduction, and gross sexual imposition. The trial court sentenced him to the maximum sentence – ten years – for the rape and abduction, which the judge merged for sentencing, consecutive to four years for gross sexual imposition. The trial court also labeled Gross as a sexual predator.

{¶ 4} On direct appeal, Gross challenged the trial court’s determination that he be classified as a sexual predator. This court affirmed the sexual predator determination, concluding that the classification was supported by clear and convincing evidence. *State v. Gross* (Aug. 17, 2000), 8th Dist. No. 76836.

{¶ 5} Subsequently, Gross applied to reopen his appeal, claiming ineffective assistance of appellate counsel. This court denied his application because it was untimely and, even if timely, Gross failed to demonstrate that counsel was ineffective. *State v. Gross*, 8th Dist. No. 76836, 2005-Ohio-1664.

{¶ 6} Gross then filed a motion in the trial court to withdraw his plea. He argued that his plea was not knowingly, voluntarily, and intelligently made because the trial court did not advise him at the plea colloquy that postrelease control would be part of his sentence. The trial court denied the motion; Gross now appeals from the trial court’s judgment.

{¶ 7} In his first assignment of error, Gross argues that his guilty plea should be vacated because the trial court did not advise him prior to accepting his plea that postrelease control would be part of his sentence. He contends that the trial court's failure to advise him of postrelease control rendered his plea involuntary under Crim.R. 11. But principles of res judicata bar Gross from now challenging the validity of his plea.

{¶ 8} Res judicata bars the further litigation in a criminal case of issues that were or could have been raised previously in a direct appeal. *State v. Leek* (June 21, 2000), 8th Dist. No. 74338, citing *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus. Gross could have raised the voluntariness of his plea on direct appeal, but did not do so. Accordingly, any issue regarding his plea is barred by res judicata.

{¶ 9} Furthermore, "Crim.R. 32.1 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." *State ex rel. Special Prosecutors v. Judges* (1978), 55 Ohio St.2d 94, 97-98, 378 N.E.2d 162. In other words, a trial court has no authority to reverse that which a superior court has affirmed. *State v. Vild*, 8th Dist. Nos. 87742 and 87965, 2007-Ohio-987. Because this court affirmed Gross's conviction in its opinion dated August 17, 2000, the trial court lacked jurisdiction to consider a motion to withdraw the guilty plea. See, e.g., *State v. McGee*, 8th Dist. No. 82092,

2003-Ohio-1966, ¶20-22; *State v. Craddock*, 8th Dist. No. 87582, 2006-Ohio-5912.

{¶ 10} Accordingly, the trial court did not err in denying Gross’s motion to withdraw his plea and his first assignment of error is therefore overruled.

II

{¶ 11} Gross next argues that his sentence is void, requiring de novo resentencing, because the trial court failed to inform him of postrelease control at his sentencing hearing.

{¶ 12} When sentencing a felony offender to a term of imprisonment, a trial court is required to notify the offender about postrelease control at the sentencing hearing and is required to incorporate that notice into its journal entry imposing sentence. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, paragraph one of the syllabus. Any sentence imposed without such notification is contrary to law and void, and the cause must be remanded for de novo resentencing. *Id.* at ¶23, 27. See, also, *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, at syllabus.

{¶ 13} The record on appeal in this case does not include the transcript of the sentencing hearing. But the corresponding journal entry makes no mention of postrelease control; it states only that the sentence “includes any extensions provided by law.”

{¶ 14} In *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, the Ohio Supreme Court made clear that for sentences imposed prior to July 11, 2006 (the effective date of R.C. 2929.191), where a trial court failed to properly impose postrelease control, the cause must be remanded for de novo resentencing. For criminal sentences imposed on or after July 11, 2006 in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191.

{¶ 15} Gross was sentenced in 1999, and the State concedes that his sentence failed to properly include postrelease control. Accordingly, we remand for de novo resentencing in accord with *Jordan*, *Bezak*, and *Singleton*.

Affirmed in part; remanded for resentencing.

It is ordered that the parties share equally the 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.

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

MELODY J. STEWART, J., and

COLLEEN CONWAY COONEY, J., CONCUR