

[Cite as *State v. Cottrell*, 2010-Ohio-5254.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. **95053**

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WAYNE C. COTTRELL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-392008

BEFORE: Boyle, J., Blackmon, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: October 28, 2010

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MARY J. BOYLE, J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶ 2} Defendant-appellant, Wayne Cottrell, appeals the trial court's decision denying his motion to withdraw his guilty plea that he filed nearly ten years after entering the plea and after he completed his one-year sentence. We affirm.

Procedural History and Facts

{¶ 3} In August 2000, Cottrell pled guilty to an amended count of burglary, in violation of R.C. 2911.12(A)(3), a third degree felony. The trial court subsequently imposed a one-year prison term, which expired in September 2001. The record further reflects that Cottrell served three years of postrelease control following his one-year prison sentence, despite the fact that the court failed to properly sentence Cottrell to postrelease control.

{¶ 4} Nearly ten years later, Cottrell moved to withdraw his guilty plea on the basis that it was not entered knowingly because the trial court failed to inform him of postrelease control. He further contended that he is “likely to suffer highly disproportionate consequences under the United States Code as a result of the conviction in this case.” While recognizing that post-sentence motions are not freely granted because such practice would allow defendants to withdraw their pleas when unfavorable sentences are received, he argued that concern does not exist in this case since he has already served his sentence. He contended the withdrawal of his plea is necessary because he would not have entered the plea had he known that “he would be subject to career offender classification.”

{¶ 5} The state opposed the motion, and the court set the matter for a hearing. At the hearing, Cottrell argued that the court should allow him to withdraw his guilty plea because the trial court failed to advise him of postrelease control. Cottrell further argued that he now faces severe consequences in his “current federal situation” as a result of the guilty plea and corresponding

conviction. Based on these circumstances, he contended that a manifest injustice had occurred.

{¶ 6} The state conceded that the trial court failed to advise Cottrell of postrelease control and that postrelease control was never properly included as part of his sentence, thereby rendering his sentence void. The state, however, pointed out that Cottrell had made a full confession in this case, as evidenced in his statement to the police that had been filed with the court. The state further argued that Cottrell's motion to vacate his plea is barred by the doctrine of res judicata because he could have raised the issue in a direct appeal but failed to do so.

{¶ 7} The trial court agreed and denied Cottrell's motion to vacate his plea. Cottrell appeals, raising the following two assignments of error:

{¶ 8} "I. The trial court erred when it denied appellant's motion to vacate his guilty plea because res judicata does not apply.

{¶ 9} "II. The trial court erred in not setting this matter for resentencing after finding the sentence previously imposed was void."

Motion to Withdraw Guilty Plea

{¶ 10} In his first assignment of error, Cottrell argues that the trial court erred in applying the doctrine of res judicata to his Crim.R. 32.1 motion because the application of res judicata "would cause a manifest injustice." In support of this claim, he specifically argues that he was only 19 years old at the time of his

plea, that he was not aware of the deficiencies of the plea colloquy within the time period to have filed an appeal, and that he is now facing an extreme sentencing enhancement in his federal criminal case as a result of his underlying conviction in this case. But we find these reasons unpersuasive and Cottrell's argument misplaced.

{¶ 11} Cottrell implicitly recognizes that res judicata applies but argues that its application in this case would be too harsh. But he fails to cite any authority, nor are we aware of any, that would create an exception to the application of res judicata when a claim falls squarely under the doctrine. Indeed, in almost all cases, the application of res judicata is arguably harsh to the party who is precluded from raising his or her claims. Nevertheless, we decline to apply the doctrine of res judicata but still find that the trial court properly denied Cottrell's Crim.R. 32.1 motion to withdraw his guilty plea.

{¶ 12} Crim.R. 32.1 provides:

{¶ 13} "A motion to withdraw a guilty plea of guilty or no contest 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."

{¶ 14} Generally, trial courts are required to treat a Crim.R. 32.1 motion as a "pre-sentence motion" in cases where a void sentence is at issue. See *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, 906 N.E.2d 422. But because

Cottrell has already served his void sentence in this case, his motion is treated as a “post-sentence motion” subject to the more stringent standard of “manifest injustice.” *State v. Simone*, 9th Dist. No. 24966, 2010-Ohio-1824.

{¶ 15} Manifest injustice is “a fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the resulting prejudice through another form of application reasonably available to him or her.”

State v. Sneed, Cuyahoga App. No. 80902, 2002-Ohio-6502. It has also been defined as “a clear or openly unjust act,” which exists only in extraordinary cases.

State v. Owens, 8th Dist. No. 94152, 2010-Ohio-3881, citing *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 1998-Ohio-271, 699 N.E.2d 83; *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324.

{¶ 16} The determination of manifest injustice is left to the sound discretion of the trial court. *Smith*, supra, paragraph two of the syllabus. Therefore, our review of a trial court’s denial of a post-sentence motion to withdraw a guilty plea is limited to a determination of whether the trial court abused its discretion. *State v. Blatnik* (1984), 17 Ohio App.3d 201, 202, 478 N.E.2d 1016.

{¶ 17} This is not an extraordinary case which demonstrates a manifest injustice. To the contrary, the facts of this case overwhelmingly support the trial court’s decision to deny Cottrell’s motion to withdraw. Here, Cottrell waited ten years to file a motion to withdraw his guilty plea to a crime that he fully confessed to having committed. See *Smith*, supra, paragraph three of the syllabus (“An

undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of a motion under Crim.R. 32.1 is a factor adversely affecting the credibility of the movant and militating against the granting of the motion.”). And while he did not present any evidence or claim challenging his confession, he merely emphasized that the underlying conviction will have severe consequences in his pending federal case. But we fail to see how the collateral consequences of his plea to a subsequent federal case, arising directly out of his further criminal activity, constitutes a manifest injustice in this case.

{¶ 18} Accordingly, the first assignment of error is overruled.

Resentencing

{¶ 19} In his second assignment of error, Cottrell argues that the trial court erred in not setting a resentencing hearing after finding that his sentence was void. But Cottrell only appealed the trial court’s denial of his motion to withdraw his guilty plea — this assignment of error therefore is unrelated to the only order that was timely appealed. Because Cottrell is attempting to bootstrap a claim that is now time-barred, we are without jurisdiction to consider it. See App.R. 4; *State v. Weese* (May 13, 1998), 9th Dist. Nos. 2742-M and 2760-M.

{¶ 20} We summarily note, however, that in those cases where a void sentence is at issue, and the defendant was sentenced prior to the enactment of R.C. 2929.191, i.e., July 11, 2006, the defendant is entitled to a new sentencing hearing *only if* the defendant has not completed his or her sentence. See *State*

v. Singleton, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, ¶18, citing *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568. Here, Cottrell has completed his sentence.

{¶ 21} The second assignment of error is overruled.

Judgment 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.

MARY J. BOYLE, JUDGE

PATRICIA ANN BLACKMON, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR