

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 04CA008483

Appellee

v.

ALAN OWENS

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 00CR055495

Appellant

DECISION AND JOURNAL ENTRY

Dated: October 20, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

SLABY, Judge.

{¶1} Defendant, Alan Owens, appeals from the decision of the Lorain County Court of Common Pleas denying his motion to withdraw his no contest plea. We affirm.

{¶2} On March 21, 2000, Defendant was indicted by the Lorain County Grand Jury for thirteen counts of Forgery, in violation of R.C. 2913.31(A)(1) and/or (A)(3), one count of Theft, in violation of R.C. 2913.02(A)(3), and one count of Receiving Stolen Property, in violation of R.C. 2913.51(A), a felony of the fourth degree. On July 26, 2001, Defendant entered a no contest plea to all counts in the indictment. Defendant was referred for a pre-sentence report.

{¶3} On November 5, 2001, Defendant was sentenced to a term of one year incarceration on counts one through thirteen, one year on count fourteen, and one and a half years on count fifteen. The time imposed on counts one through thirteen was to be served concurrently, consecutive to the time imposed on counts fourteen and fifteen for a total of three and a half years incarceration. Defendant was also ordered to pay restitution.

{¶4} On April 6, 2004, Defendant filed a pro se motion to withdraw his plea. He alleged that, under R.C. 2913.51, he should have been convicted of a fifth degree felony, not a fourth degree felony, for receiving stolen property. The trial court denied Defendant's motion on April 28, 2004. Subsequently, Defendant filed a motion for findings of fact and conclusions of law, which the court denied on May 18, 2004. Defendant appeals, raising one assignment of error for our review.

ASSIGNMENT OF ERROR

“The trial court erred as a matter of law to the prejudice of [Defendant] when it convicted [Defendant] of receiving stolen property, of the fourth degree, violation of R.C. § 2913.51.”

{¶5} Defendant asserts that the trial court erred when it convicted him of Receiving Stolen Property, a violation of R.C. 2913.51, a felony of the fourth degree. He maintains that the facts of his case should only have invoked a fifth degree felony charge. Defendant alleges that the trial court erred in denying his

motion to withdraw his no contest plea to challenge his conviction under R.C. 2913.51. We disagree.

{¶6} An appellate court may not review de novo a trial court’s decision denying a post-sentence motion to withdraw a guilty plea. *State v. Xie* (1992), 62 Ohio St.3d 521, 527. We may reverse the trial court’s decision only upon a finding that it abused its discretion in denying a motion to withdraw a guilty plea. *State v. Honorable* (Sept. 23, 1987), 9th Dist. No. 13076, at 3. In order to find an abuse of discretion, we must determine that the trial court’s decision was unreasonable, arbitrary or unconscionable, and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219; *State ex rel. Askew v. Goldhart* (1996), 75 Ohio St.3d 608, 610.

{¶7} Crim.R. 32.1 dictates when a motion to withdraw a guilty plea or no contest plea may be made. It provides that the motion “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.” *Id.*

{¶8} A defendant does not have an absolute right to withdraw his guilty plea. *Xie*, 62 Ohio St.3d 521, at paragraph one of the syllabus. Pursuant to Crim. R. 32.1, a post-sentence motion to withdraw a guilty plea must demonstrate a manifest injustice. *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus.

{¶9} The Supreme Court of Ohio stated that:

“[a]lthough [Crim.R. 32.1] does not provide for a time limit after the imposition of sentence, during which a motion to withdraw a plea of guilty must be made, it has been held that an undue delay between the occurrence of the alleged cause for withdrawal and the filing of the motion is a factor adversely affecting the credibility of the movant and militating against the granting of the motion.” *Smith*, 49 Ohio St.2d at 264.

In this case, almost three years passed from the time Defendant was sentenced to the time he filed his motion to withdraw his no contest plea.

{¶10} Defendant has the burden of establishing the existence of manifest injustice. *State v. Gegia*, 157 Ohio App.3d 112, 2004-Ohio-2124 at ¶8. The record reveals that Defendant was represented by counsel at the time he entered his plea, and at the time he was sentenced. Defendant did not raise ineffective assistance of counsel as an assignment of error. The arguments that Defendant is now raising could have been made in the trial court, or pursued upon direct appeal.

{¶11} The plain language of Defendant’s indictment put him on notice that he was being charged with a fourth degree felony under R.C. 2913.51. Count fifteen of Defendant’s indictment stated that the indictment was issued for a “violation of Section 2913.51(A) of the Ohio Revised Code, said property being listed in section 2913.71 of the Revised Code, a Felony of the Fourth Degree.”

{¶12} A criminal indictment serves two purposes. First, an indictment compels the government to aver all material facts constituting the essential elements of an offense, providing the accused adequate notice and the opportunity

to defend the charges. *State v. Childs* (2000), 88 Ohio St.3d 194, 198. Second, the indictment, “by identifying and defining the offenses[,] *** serves to protect the accused from future prosecutions for the same offense.” *Id.* In this case, the indictment made Defendant aware that he was being charged with a fourth degree felony.

{¶13} Defendant never brought to the court’s attention any problem with the indictment. The problem that Defendant now complains of, almost three years after he was sentenced, existed from the very start of his case, and could have easily been corrected.

“It is a general rule that an appellate court will not consider any error which counsel for a party complaining of the trial court’s judgment could have called but did not call to the trial court’s attention at a time when such error could have been avoided or corrected by the court.” *State v. Glaros* (1960), 170 Ohio St. 471, 475

{¶14} Defendant, claims, essentially, that the trial court erred in sentencing him for a fourth degree felony for receipt of stolen goods, rather than a fifth degree felony. Appeal or post-conviction relief are remedies at law to review claimed sentencing errors. *Blackburn v. Jago* (1988), 39 Ohio St.3d 139, 139. Defendant’s failure to appeal his judgment of conviction bars him from litigating any issues that could have been raised on direct appeal. See *State v. Dick* (2000), 137 Ohio App.3d 260, 263.

“Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have

been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment.” (Emphasis omitted.) *State v. Szefcyk* (1996), 77 Ohio St.3d 93, 95, quoting *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus.

Because Defendant could have raised the trial court’s alleged violation on direct appeal, he is barred from raising it in his motion to withdraw his plea.

{¶15} We find that the trial court did not abuse its discretion in denying Defendant’s motion to withdraw his plea. Defendant’s assignment of error is overruled and the decision of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that 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 Lorain, 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.

Exceptions.

LYNN C. SLABY
FOR THE COURT

WHITMORE, P. J.
BOYLE, J.
CONCUR

APPEARANCES:

ALAN L. OWENS, Inmate # 420-906, 501 Thompson Road, P. O. Box 8000, Conneaut, Ohio 44030, Appellant.

GARY BENNETT, Prosecuting Attorney and BILLIE JO BELCHER, Assistant Prosecuting Attorney, 225 Court Street, Elyria, Ohio 44035, for Appellee.