[Cite as *State v. McGee*, 2009-Ohio-3374.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91638

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BELVIN MCGEE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-383003

BEFORE: Stewart, P.J., Boyle, J., and Sweeney, J.

RELEASED: July 9, 2009

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), is filed within ten (10) 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. II, Section 2(A)(1).

MELODY J. STEWART, P.J.:

{¶ 1} Defendant-appellant, Belvin McGee, appeals from the court's refusal to vacate his December 1999 guilty pleas to multiple charges of rape and gross sexual imposition. McGee sought to vacate the pleas on grounds that the court failed to advise him that he would be subject to a mandatory term of postrelease control. The court denied the motion on two grounds: that res judicata barred McGee from filing successive motions to withdraw his guilty plea and that the sentencing judge substantially complied with Crim.R. 11 when it accepted McGee's guilty plea.

{¶ 2} This case has a lengthy procedural history that we address only as necessary for the resolution of this appeal. We affirmed McGee's conviction in *State v. McGee*, Cuyahoga App. No. 77463, 2001-Ohio-4238, specifically rejecting, among other arguments, a Crim.R. 11 challenge based on the trial court's alleged failure to correctly inform him of his parole eligibility. McGee then filed the first of six separate motions to withdraw his guilty plea, again questioning the voluntariness of his guilty plea under Crim.R. 11. We affirmed the court's refusal to vacate the plea, and also rejected McGee's argument that he did not understand the meaning of postrelease control because McGee had not raised that issue with the trial court. *State v. McGee*, Cuyahoga App. No. 82092, 2003-Ohio-1966, ¶18. We also found merit to the state's argument that res judicata

barred McGee from relitigating any issues relating to the guilty plea because those issues had been raised, or should have been raised, in the direct appeal. Id. at ¶21, citing *State ex rel. Special Prosecutors v. Judges* (1978), 55 Ohio St.2d 94, 97-98 ("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.").

{¶ 3} In 2006, McGee filed a Crim.R. 47 "motion for correction of invalid pleas and sentences," arguing that neither the court's original sentencing entry nor the transcript of the guilty pleas indicated that a term of postrelease control would be imposed following his release from prison. The court denied the motion to correct the sentence, but on appeal we reversed because the court's sentencing entry simply stated that it "includes any extensions provided by law." See *State v. McGee*, Cuyahoga App. No. 89133, 2007-Ohio-6655, ¶13. We found this statement insufficient under paragraph one of the syllabus to *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085 ("When sentencing a felony offender to a term of imprisonment, a trial court is required to notify the offender at the sentencing hearing about postrelease control and is further required to incorporate that notice into its journal entry imposing sentence."). Id. at ¶14. Under authority of *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, we were compelled to find the court's December 1999 sentencing void and ordered the

court to "resentence the offender as if there had been no original sentence." Id. at ¶16, citing *Bezak*.

{¶ 4} On remand for resentencing, McGee filed the motion to withdraw the guilty plea that is the subject of this appeal. Citing to paragraph two of the syllabus to *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, for the proposition that a guilty plea must be vacated if the trial court fails during the plea colloquy to advise a defendant that a sentence will include a mandatory term of postrelease control, McGee argued that the court's failure to advise him of postrelease control rendered his pleas involuntary under Crim.R. 11.

{¶ 5} In a hearing on the motion, the court noted the "unusual posture in this case" because "[it] has gone up and down several times," and that during the litigation McGee had raised the subject of postrelease control, so he was barred by res judicata from raising it again. The court also found that the sentencing judge had substantially complied with the requirements of Crim.R. 11 during the plea colloquy such that McGee had been placed on notice that there would be five years of postrelease control. The court denied the motion to withdraw the plea and resentenced McGee to the same sentence that had originally been imposed in 1999.

I

{¶ 6} McGee's primary argument on appeal is that the court erred by failing to follow *Sarkozy* and permit withdrawal of the plea. The state argues

that we need not apply *Sarkozy* because principles of res judicata barred McGee from raising the validity of his guilty plea in a successor motion to vacate the guilty plea.

{¶ 7} Paragraph two of the syllabus to *Sarkozy* states: "If the trial court fails during the plea colloquy to advise a defendant that the sentence will include a mandatory term of postrelease control, the court fails to comply with Crim.R. 11, and the reviewing court must vacate the plea and remand the cause." Unlike the court's holding in *Bezak* that a sentence is void if it fails to incorporate the terms of postrelease control, *Sarkozy* is premised on the knowing, intelligent or voluntary nature of a plea made in the absence of an advisement as to the terms of postrelease control as required by Crim.R. 11. An invalid guilty plea is not a void guilty plea. In fact, *Sarkozy* does not use the word "void" at any point.

{¶ 8} The distinction between a void sentence and an invalid guilty plea is important in this case when principles of res judicata are applied. Res judicata bars the assertion of claims from a valid, final judgment of conviction that have been raised or could have been raised on direct appeal. *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus. As we noted in Case No. 89133, principles of res judicata do not apply to void sentences because, by definition, a void sentence means that no final judgment of conviction has been announced. The void nature of McGee's sentence meant that his original sentence was a nullity — the net effect being that he was not sentenced. We therefore ordered,

pursuant to *Bezak,* that McGee be resentenced due to the court's failure to mention postrelease control in his original sentence. See *McGee*, 2007-Ohio-6655, at ¶17-18.

{¶ 9} This court though, among many others, has applied res judicata to bar the assertion of claims in a motion to withdraw a guilty plea that were, or could have been, raised at trial or on direct appeal. *State v. Robinson,* Cuyahoga App. No. 85266, 2005-Ohio-4154, at ¶11; *State v. Totten*, Franklin App. No. 05AP-278 and 05AP-508, 2005-Ohio-6210 (collecting cases).

{¶ 10} These cases are premised on *State ex rel. Special Prosecutors v. Judges of Belmont Cty. Court of Common Pleas* (1978), 55 Ohio St.2d 94, 97, in which the supreme court stated: "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." We explained the underpinnings of *Special Prosecutors* in *State v. Vild,* Cuyahoga App. Nos. 87742 and 87965, 2007-Ohio-987, stating that a trial court simply had no authority to reverse that which a superior court had affirmed. Id. at ¶13.

{¶ 11} In *State v. Craddock*, Cuyahoga App. No. 87582, 2006-Ohio-5912, we considered a very similar fact pattern in which Craddock attempted to withdraw his guilty plea following a reversal for resentencing due to the court's failure to advise him of postrelease control. Citing to *Special Prosecutors*, we noted that Craddock's case had been remanded for the sole purpose of resentencing and

that "[t]his court's judgment affirming the finding of guilt is 'controlling upon the lower court as to all matters within the compass of the judgment' and, therefore, the trial court had no jurisdiction to consider Craddock's motion, much less to allow him to withdraw his guilty plea and grant a new trial." Id. at ¶10, quoting *State ex rel. Special Prosecutors*, 55 Ohio St.2d at 97. See, also, *State v. Moore*, Ottawa App. No. OT-08-009, 2008-Ohio-6398, ¶13 (declaring appeal frivolous based on suggested assignment of error that court erred by refusing to allow the withdrawal of a plea that had been affirmed on direct appeal).

{¶ 12} We affirmed McGee's conviction on direct appeal in 2001, specifically rejecting a Crim.R. 11 challenge based on the trial court's alleged failure to correctly inform him of his parole eligibility. He could have, but did not, raise an issue relating to the imposition of postrelease control in that direct appeal. During the period following our affirmation of his guilty pleas, we have steadfastly applied res judicata to reject McGee's repeated attempts to vacate his guilty plea. Under the authority of *Special Prosecutors*, the trial court simply had no authority to vacate that which we had affirmed in *State v. McGee*, Cuyahoga App. No. 77463.

{¶ 13} *Sarkozy* does not purport to affect the well-established application of res judicata to motions to withdraw guilty pleas that have been affirmed on direct appeal. It only considers the validity of a guilty plea, challenged on direct appeal, when the court fails to advise a defendant of the terms of postrelease

control as part of the maximium sentence. We therefore reject McGee's argument that *Sarkozy* requires automatic vacation of his guilty plea.

{¶ 14} We next consider whether the supreme court's recent decision in *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, impacts our analysis. The syllabus to *Boswell* states: "A motion to withdraw a plea of guilty or no contest made by a defendant who has been given a void sentence must be considered as a presentence motion under Crim.R. 32.1." Boswell pleaded guilty to certain felony offenses. His two motions for leave to file a delayed appeal, made four and five years after entering his guilty plea, were denied. He then filed a motion to withdraw his guilty plea on grounds that the court did not properly advise him during the plea proceedings of the mandatory term of postrelease control and the penalties associated with violating postrelease control. The trial court granted the motion. We affirmed on appeal, rejecting the state's argument that the trial court had improperly applied the "manifest injustice" standard of Crim.R. 32.1.

{¶ 15} The supreme court affirmed, but employed a different analysis than that used by the court of appeals. Noting that the trial court failed to include the terms of postrelease control in Boswell's sentence, the supreme court found the sentence void and the parties were placed in the same position as though there had been no sentence. Id. at ¶8. It held that the trial court should have considered the motion to withdraw the guilty plea as being made presentence as

opposed to postsentence. Id. at ¶10. Because the trial court did not enunciate the standard it employed when granting Boswell's motion to vacate the guilty plea, the supreme court remanded the motion to the trial court for consideration of the motion under the "freely granted" standard used for presentence motions to withdraw guilty pleas. Id. at ¶13.

{¶ 16} When considering McGee's motion to withdraw his guilty plea, the court did not state which standard it used when ruling on that motion. The supreme court's remand in *Boswell* arguably would suggest that we do the same; that is, remand this matter to the trial court to ensure consideration of the motion as a presentence motion. However, *Boswell* had no occasion to consider the impact of res judicata on previously resolved questions on the validity of a guilty plea. Id. at ¶11. Given our finding under *Special Prosecutors* that the trial court had no authority to vacate a guilty plea that we had previously affirmed, a *Boswell* issue relating to whether the trial court used the correct standard for reviewing a motion to withdraw a guilty plea is not a concern. The court had no authority to grant the motion to vacate the guilty plea in the first instance, so any discussion concerning the standard of review it may have employed is immaterial. We therefore overrule the assigned error, as well as the first, second, third, and sixth pro se assignments of error.

II

{¶ 17} In his fourth pro se assignment of error, McGee complains that the court lacked authority to resentence him on the eight-year sentence under count 17 because he had served that sentence prior to being resentenced. We summarily reject this assertion because the court's sentencing entry shows that it ordered count 17 to be served consecutively to the remaining counts for which a life sentence had been imposed.

III

{¶ 18} The fifth pro se assignment of error complains that the judge assigned to the case after the sentencing judge's retirement was not properly assigned the case. We overrule this assignment because McGee did not object to any alleged irregularities. See *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, paragraph one of the syllabus.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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 Cuyahoga County Court of Common Pleas 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.

MELODY J. STEWART, PRESIDING JUDGE

MARY J. BOYLE, J., and
JAMES J. SWEENEY, J., CONCUR