[Cite as *State v. Austin*, 2019-Ohio-3101.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 107872
v.	:	
DIMITRIC AUSTIN,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: August 1, 2019

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case Nos. CR-79-050538-ZA and CR-80-052921-ZA

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Frank Romeo Zeleznikar, Assistant Prosecuting Attorney, *for appellee*.

Dimitric Austin, *pro se*.

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Dimitric Austin ("appellant"), brings the instant appeal challenging the trial court's judgment denying his motion to vacate his convictions for attempted rape and carrying a concealed weapon. Specifically, appellant argues that the trial court erred by denying his motion to vacate because

the trial court failed to comply with Crim.R. 11 and, as a result, his guilty pleas were not knowingly, intelligently, and voluntarily entered. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

A. 1980 Guilty Pleas

{¶ 2} The instant appeal pertains to guilty pleas that appellant entered in two criminal cases. First, in Cuyahoga C.P. No. CR-79-050538-ZA, appellant pled guilty in February 1980 to attempted rape. In September 1980, appellant was sentenced to prison for a period of "4 to 25 years." On October 27, 1980, the trial court issued a nunc pro tunc sentencing entry clarifying that appellant's prison sentence was for a term of 4 to 15 years.

{¶ 3} Second, in Cuyahoga C.P. No. CR-80-052921-ZA, appellant pled guilty in December 1980 to attempted rape and carrying a concealed weapon. The trial court sentenced appellant to a prison term of 5 to 15 years on the attempted rape count and a prison term of 3 to 10 years on the carrying a concealed weapon count. The trial court ordered the counts to run concurrently to one another.

{¶ 4} The trial court ordered appellant's sentence in CR-79-050538-ZA to run concurrently with his sentence in CR-80-052921-ZA.

{¶ 5} Appellant did not file an appeal challenging his guilty pleas, convictions, or the trial court's sentence.

B. Colorado Proceedings

{¶ 6} In or around June 2003, a jury in the District Court for Arapahoe County, Colorado convicted appellant of first-degree assault. Appellant was subsequently adjudicated a habitual criminal. In September 2004, appellant was sentenced to a prison term of 64 years. *See Austin v. Milyard*, Colo. No. 11-cv-00633-RBJ, 2011 U.S. Dist. LEXIS 147927 (Dec. 22, 2011). Appellant's conviction was affirmed on direct appeal, and the Colorado Supreme Court denied appellant's petition for review in February 2008.

{¶ 7} In August 2008, appellant filed a motion for postconviction relief, alleging that he was denied the right to effective assistance of both trial and appellate counsel. The trial court denied appellant's motion in February 2009, and the trial court's ruling was affirmed on appeal in September 2010. The Colorado Supreme Court declined to review the matter in February 2011.

{¶ 8} Appellant filed an application for a writ of habeas corpus in March 2011, in which he argued, in relevant part, that (1) the trial court in the habitual criminal proceedings erred in denying his motion to preclude the use of his Ohio convictions, and (2) appellate counsel was ineffective for failing to file a direct appeal challenging his Ohio convictions. *Id*. at 5. Appellant also appeared to suggest that his trial counsel during the Ohio change-of-plea proceedings was ineffective. *See id*. at 19.

{¶ 9} Appellant alleged that his habitual criminal adjudication violated his constitutional rights because the prior convictions upon which the adjudication was

based, including the Ohio convictions, were unconstitutional.[1] Specifically, appellant argued that the prior convictions were obtained pursuant to guilty pleas that were not knowingly, intelligently, and voluntarily entered.

{¶ 10} In December 2011, the Colorado District Court rejected appellant's arguments, concluding that (1) appellant was not entitled to habeas relief because he could have, but failed to challenge the validity of his 1980 guilty pleas in Ohio, and (2) appellant failed to demonstrate that counsel was ineffective for failing to file a direct appeal challenging his prior convictions in Ohio. Regarding the second finding, the court explained,

> There is no record of the providency hearings for the Ohio cases. Although [appellant] testified that his counsel in the first Ohio case told him he would not be allowed to testify, [appellant] also testified that he could not recall the substance of the trial court's advisement on this matter. Accordingly, the only affirmative evidence [appellant] presented in the state trial court to show that his pleas were involuntary was his own testimony regarding statements made by to him by counsel before he entered his first guilty plea. This evidence does not suffice to demonstrate that the trial court failed to advise him of his right to testify before accepting his pleas. *See Parke v. Raley*, 506 U.S. 20, 30, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992) (final judgment of conviction pursuant to a guilty plea is presumed valid, even in the absence of a transcript of the providency proceeding, unless defendant makes an affirmative showing of invalidity); *see also* [*U.S. v. Krejcarek*, 453 F.3d 1290, 1297-98 (10th Cir.2006)] ("Self-serving statements by a defendant that his conviction was constitutionally infirm are insufficient to overcome the presumption of regularity accorded prior convictions") (citing *Cuppett v. Duckworth*, 8 F.3d 1132, 1139 (7th Cir.1993)). Moreover, to the extent [appellant] asserts that his guilty plea was rendered invalid by counsel's erroneous advice, his failure to demonstrate a deficient advisement by the trial court on his right to testify precludes any finding of prejudice — i.e, that but for counsel's

[1] The habitual criminal adjudication was based on appellant's Ohio convictions as well as a prior conviction for "first degree sexual abuse" in the state of Missouri. *See Austin*, Colo. No. 11-cv-00633-RBJ, 2011 U.S. Dist. LEXIS 147927, at 19.

> asserted erroneous advice, he would not have pled guilty but would have insisted on proceeding to trial. *See* [*Hill v. Lockhart*, 474 U.S. 52, 56-59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)].
>
> The Court finds that the state appellate court's determination that appellate counsel was not ineffective in failing to challenge the Ohio convictions on appeal comported with applicable federal law. [Appellant] therefore is not entitled to relief[.]

Austin at 41-42.

C. Subsequent Challenges to the 1980 Guilty Pleas

{¶ 11} On December 24, 2012, appellant filed a pro se petition for postconviction relief.[2] Therein, appellant alleged that his guilty pleas were not knowingly, intelligently, and voluntarily entered. Specifically, appellant asserted that his convictions were "obtain[ed] in violation of [Crim.R.] 11," and that "his constitutional rights were violated because his conviction resulted from ineffective assistance of counsel, an involuntary and unknowing guilty plea, and non-compliance with the then existing [Crim.R. 11]." Appellant appeared to allege that the transcripts from his 1980 change-of-plea hearings did not exist because they had been destroyed in a fire.

{¶ 12} The trial court denied appellant's petition on January 22, 2013. Appellant filed an appeal challenging the trial court's judgment on February 20, 2013. 8th Dist. Cuyahoga No. 99549. However, this court dismissed the appeal in March 2013 based on appellant's failure to comply with App.R. 9(B).

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[2] The petition was filed in CR-79-050538-ZA.

{¶ 13} On September 27, 2018, appellant filed a motion to vacate his convictions.[3] Therein, appellant argued again that the trial court failed to comply with Crim.R. 11. Specifically, appellant asserted that "[there is] no evidence that [he] was given his [Crim.R. 11] [a]dvisement[s] by the [trial court in 1980]." Appellant appeared to argue that without a transcript of the change-of-plea hearings, it is presumed that he was not given the Crim.R. 11 advisements by the trial court. Finally, appellant referenced his constitutional right to effective assistance of counsel but failed to argue, much less demonstrate, how counsel's performance was deficient during the change-of-plea proceedings or how he was prejudiced therefrom. Rather, appellant alleged that the trial court failed to inform him that his convictions could be used against him at a later date, and that had the court informed him of such, he would not have pled guilty.

{¶ 14} The trial court denied appellant's motion to vacate on October 15, 2018. It is from this judgment that appellant filed the instant appeal on November 7, 2018. This court initially dismissed the appeal on November 26, 2018, based on appellant's failure to comply with App.R. 3. Appellant filed a motion for reconsideration on December 13, 2018. This court granted appellant's motion and reinstated the appeal on December 19, 2018.

{¶ 15} Appellant challenges the trial court's judgment denying his motion to vacate his convictions. He appears to assign three errors for our review:

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[3] The motion to vacate was filed in both criminal cases.

I. Did the [trial court] abuse its discretion when it failed to vacate or recall [appellant's s]entence which prejudice [sic] him because [appellant] cannot overcome the missing [transcript] of the [Crim.R.] 11 advisement.

II. Did [appellant] receive ineffective assistance of counsel in violation of his State and Federal constitutional safeguards for reasons outlined herein?

III. Did the court violated [sic] [appellant's] due process rights by accepting guilty plea without inform[ing] him of the enumerated [rights] in [Crim.R. 11 (C)(2)(c)].

II. Law and Analysis

A. Guilty Plea

{¶ 16} In his first and third assignments of error, appellant appears to challenge the validity of his guilty pleas. Specifically, he appears to argue that the trial court did not inform him during the 1980 change-of-plea hearings that his convictions could be considered or used against him in subsequent criminal proceedings in order to enhance a sentence: "[t]he trial court fail to advise the defendant that by him entering a plea of guilty that the plea would or could be used against him at a later date as a sentence enhancement as a habitual criminal, this prejudiced the defendant. During the plea colloquy, the court fail to comply with Crim.R. 11." Appellant's brief at 6.

{¶ 17} "When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). A trial court must strictly comply with the Crim.R. 11(C)(2)(c)

provisions concerning constitutional rights, and substantially comply with the nonconstitutional notifications under Crim.R. 11(C)(2)(a) and (b). *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 18; *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990).

{¶ 18} After reviewing the record, we find that appellant's first and third assignments of error and the arguments raised therein are barred by res judicata. *See State v. Poole*, 8th Dist. Cuyahoga No. 105765, 2017-Ohio-8323, ¶ 10 (appellant's motion to withdraw his November 2009 guilty pleas, filed in April 2017, was barred by res judicata to the extent that appellant argued that the trial court failed to comply with Crim.R. 11 in accepting his pleas); *State v. Moore*, 8th Dist. Cuyahoga Nos. 100483 and 100484, 2014-Ohio-5682, ¶ 28. "Res judicata prevents repeated attacks on a final judgment and applies to all issues that were or might have been litigated." *State v. Sneed*, 8th Dist. Cuyahoga No. 84964, 2005-Ohio-1865, ¶ 16, citing *State v. Brown*, 8th Dist. Cuyahoga No. 84322, 2004-Ohio-6421.

> In a postconviction proceeding, res judicata bars the assertion of claims against a valid, final judgment of conviction that have been raised or *could have been raised on appeal*. *State v. Coley-Carr*, 8th Dist. Cuyahoga No. 101611, 2014-Ohio-5556, ¶ 11, citing *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus. Courts have repeatedly applied the doctrine of res judicata to postconviction motions to withdraw a guilty plea under Crim.R. 32.1. *Id.*; *State v. Congress*, 8th Dist. Cuyahoga No. 102867, 2015-Ohio-5264, ¶ 6-10.

(Emphasis added.) *State v. Kraatz*, 8th Dist. Cuyahoga No. 103515, 2016-Ohio-2640, ¶ 9.

{¶ 19} In the instant matter, by failing to file a timely appeal challenging his 1980 guilty pleas and convictions, appellant waived his right to appeal any issues regarding the validity of his guilty pleas. Appellant could have raised this issue on direct appeal, but failed to do so. Nothing precluded appellant from filing a timely appeal contesting whether his February and December 1980 guilty pleas were knowingly, intelligently, and voluntarily entered. Appellant did not challenge the validity of his guilty pleas until December 2012 — 30 years after he entered the guilty pleas — when he filed his petition for postconviction relief.

{¶ 20} Res judicata would also bar appellant's arguments challenging the knowing, intelligent, and voluntary nature of his 1980 guilty pleas because this is an appeal from appellant's *second* motion challenging the validity of his guilty pleas. As noted above, after appellant's arguments regarding the validity of his 1980 guilty pleas were rejected by the Colorado courts, he filed a petition for postconviction relief in December 2012. "'The doctrine of res judicata is applicable to successive motions to withdraw a guilty plea under Crim.R. 32.1.'" *State v. Steinke*, 8th Dist. Cuyahoga No. 100345, 2014-Ohio-2059, ¶ 20, quoting *State v. Muhumed*, 10th Dist. Franklin No. 11AP-1001, 2012-Ohio-6155, ¶ 13.

{¶ 21} Assuming, arguendo, that appellant's arguments are not barred by res judicata, we find no basis upon which to conclude that appellant's guilty pleas were not knowingly, intelligently, and voluntarily entered. Appellant failed to provide this court with a transcript of the 1980 change-of-plea hearings, precluding this

court from engaging in any meaningful review of the purported Crim.R. 11 violations.

{¶ 22} Generally, unless the record contains affirmative evidence demonstrating otherwise, this court presumes regularity in the trial court proceedings. *State v. Raber*, 134 Ohio St.3d 350, 2012-Ohio-5636, 982 N.E.2d 684, ¶ 19. In this case, presuming regularity requires us to presume that appellant was properly advised of his Crim.R. 11 rights prior to entering his guilty pleas in 1980. *See Poole*, 8th Dist. Cuyahoga No. 105765, 2017-Ohio-8323, at ¶ 11.

{¶ 23} In the instant matter, appellant acknowledges that the transcripts from the 1980 change-of-plea hearings are not in the record before this court. *See* appellant's brief at 3 ("[there is] no transcript of the court addressing [appellant] in regards to a [Crim.R.] 11 advisement.") Nevertheless, appellant appears to argue that without a transcript of the 1980 change-of-plea hearings, this court should presume that the trial court failed to comply with Crim.R. 11 in accepting appellant's guilty pleas. In support of his argument, appellant directs this court to *Parma v. Lemajic*, 8th Dist. Cuyahoga No. 102620, 2015-Ohio-3888, and *State v. Lucente*, 7th Dist. Mahoning No. 03 MA 216, 2005-Ohio-1657. Additionally, in his motion to vacate, appellant cited *Mayfield Hts. v. Grigoryan*, 2015-Ohio-607, 27 N.E.3d 578 (8th Dist.), for the proposition that without a transcript of the change-of-plea hearings confirming that a trial court advised a defendant of his or her Crim.R. 11 rights, it is presumed that the advisements were not provided to the defendant. *Lemajic*, *Lucente*, and *Grigoryan* all involve the trial court's obligation under R.C.

2943.031 to advise a criminal defendant of the possible consequences and immigration/deportation implications of a guilty or no contest plea.

{¶ 24} Appellant is a United States citizen. As such, R.C. 2943.031 is entirely inapplicable, and appellant's reliance on *Lemajic*, *Lucente*, and *Grigoryan* is misplaced. The issue with respect to appellant's 1980 guilty pleas is whether the trial court complied with *Crim.R. 11*, not whether there was compliance with R.C. 2943.031. Finally, R.C. 2943.031 became effective in October 1989, more than eight years after appellant pled guilty in February and December 1980.

{¶ 25} The only evidence in the record before this court regarding Crim.R. 11 is the trial court's journal entries. First, regarding CR-79-050538-ZA, the trial court's February 14, 1980 journal entry provides, "Deft in court w/counsel after being fully advised of rights, including those described in Crim Rule 11, and with agreement of the pros., Deft allowed to plead guilty to att[empted] rape[.]" The trial court's February 27, 1980 journal entry provides, in relevant part,

> Now comes the Prosecuting Attorney on behalf of the State of Ohio and defendant Dimitric Austin in open court with his counsel present and *was fully advised of his constitutional rights. Including those [rights] described in Criminal Rule 11*.
>
> Thereupon said defendant retracts his plea of not guilty heretofore entered, and for plea to said indictment days he is guilty of [attempted rape] * * * which plea, upon recommendation of the Prosecuting Attorney is accepted by the court.

(Emphasis added.)

{¶ 26} Second, regarding CR-80-052921-ZA, the trial court's December 2, 1980 journal entry provides, "Deft present in Crt w/ [counsel]. CRE per [Crim.R.

11]. Deft enters plea of guilty to Cnt Two[attempted rape] and Cnt Three [carrying a concealed weapon.]" The trial court's December 16, 1980 journal entry provides, in relevant part,

> Now comes the Prosecuting Attorney on behalf of the State of Ohio and defendant Dimitric Austin in open court with his counsel present and *was fully advised of his constitutional rights.*
>
> Thereupon said defendant retracts his plea of not guilty heretofore entered, and for plea to said indictment days he is guilty of [attempted] rape * * * and guilty to [carrying a concealed weapon], which pleas on the recommendation of the Prosecuting Attorney are accepted by the court.

(Emphasis added.)

{¶ 27} Based on the record before this court, it is unclear whether the transcripts from the 1980 change-of-plea hearings exist. As noted above, appellant alleged in his December 2012 petition for postconviction relief that the transcripts had been destroyed in a fire. However, appellant originally filed the instant appeal pursuant to App.R. 9(B). Appellant's November 7, 2018 notice of appeal provides, in relevant part, "[a] copy of the plea entr[ies] and [Crim.R. 11] advisement[s] on February 14th, 1980 and December 2, 1980[,] will be necessary to resolve the issues on appeal. And under the open records act[,] a defendant that is indigent can be granted."

{¶ 28} Nevertheless, on December 18, 2018, this court, sua sponte, converted the record on appeal to an App.R. 9(A) record because the trial court did not hold a hearing on appellant's motion to vacate, and thus, no transcript existed. Additionally, if the transcripts from the change-of-plea hearings do exist, appellant

failed to provide them to this court. Although it is appellant's responsibility to provide this court with a complete record, appellant has only provided this court with portions of the transcript from the proceedings in Colorado. *See State v. Phelps*, 8th Dist. Cuyahoga No. 106735, 2018-Ohio-4709, ¶ 19.

{¶ 29} In addition to failing to provide a transcript from the change-of-plea hearings, appellant has also failed to provide this court with an alternative record of the change-of-plea proceedings pursuant to App.R. 9(C) or (D). When a transcript is not available, the appellant is obligated to provide the appellate court with a complete record pursuant to App.R. 9(C), (D), or (E). *See Cleveland Hts. v. Martin*, 8th Dist. Cuyahoga No. 105118, 2017-Ohio-4448, ¶ 8, citing *State v. Glover*, 8th Dist. Cuyahoga No. 55880, 1990 Ohio App. LEXIS 5465 (Dec. 13, 1990). "[A]bsent a transcript or alternative record under App.R. 9(C) or (D) if a transcript from [a] hearing does not exist, we must presume regularity in the proceedings below." *State v. Martinez*, 8th Dist. Cuyahoga No. 101474, 2015-Ohio-1293, ¶ 16, citing *State v. Lababidi*, 2012-Ohio-267, 969 N.E.2d 335, ¶ 13 (8th Dist.), and *State v. Rice*, 8th Dist. Cuyahoga No. 95100, 2011-Ohio-1929.

{¶ 30} For all of the foregoing reasons, appellant's first and third assignments of error also fail on the merits. Appellant's claim that his guilty pleas were not knowingly, intelligently, and voluntarily entered are entirely dependent on the nonexistent transcripts from the change-of-plea hearings. Without these transcripts, we must presume regularity in the trial court proceedings — that the trial court complied with Crim.R. 11.

B. Ineffective Assistance of Counsel

{¶ 31} In his second assignment of error, appellant argues that he was denied the constitutional right to effective assistance of counsel. Specifically, he asserts that trial counsel failed to adequately advise him of "a number of important non-collateral consequences of his pleas[.]" Appellant's brief at 3. He further asserts that counsel failed to inform him that his convictions could later be used against him for purposes of the habitual criminal proceedings and sentencing enhancement in Colorado. Finally, appellant claims that had his counsel advised him that his convictions could be used against him at a later date, he would not have pled guilty and would have insisted on going to trial.

{¶ 32} Appellant's ineffective assistance of counsel claim is barred by res judicata. Appellant could have, but failed to, raise his ineffective assistance claim in a timely appeal from his 1980 convictions. Additionally, appellant did, in fact, raise this argument — that his guilty plea was not knowingly, intelligently, and voluntarily entered because he was denied his constitutional right to effective assistance of counsel — in his December 2012 petition for postconviction relief. The trial court rejected appellant's argument, and appellant failed to perfect an appeal in compliance with App.R. 9(B) therefrom.

> A claim of ineffective assistance of counsel is waived by a guilty plea, except to the extent that the ineffective assistance of counsel caused the defendant's plea to be less than knowing, intelligent and voluntary. *State v. Williams*, 8th Dist. Cuyahoga No. 100459, 2014-Ohio-3415, ¶ 11, citing *State v. Spates*, 64 Ohio St.3d 269, 272, 1992-Ohio-130, 595 N.E.2d 351 (1992), citing *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). Where a defendant has entered a

> guilty plea, the defendant can prevail on an ineffective assistance of counsel claim only by demonstrating that there is a reasonable probability that, but for counsel's deficient performance, he would not have pled guilty to the offenses at issue and would have insisted on going to trial. *Williams* at ¶ 11, citing *State v. Xie*, 62 Ohio St.3d 521, 524, 584 N.E.2d 715 (1992), and *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

State v. Vinson, 2016-Ohio-7604, 73 N.E.3d 1025, ¶ 30 (8th Dist.). In postconviction cases alleging ineffective assistance of counsel, "'the petitioner bears the initial burden to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel's ineffectiveness.'" (Emphasis deleted.) *State v. Calhoun*, 86 Ohio St.3d 279, 283, 714 N.E.2d 905 (1999), quoting *State v. Jackson*, 64 Ohio St.2d 107, 413 N.E.2d 819 (1980), syllabus.

{¶ 33} In the instant matter, appellant failed to present any evidentiary documents in support of his ineffective assistance of counsel claim. Nor did appellant attach any supporting evidentiary documents to his motion to vacate. As noted above, the only supporting exhibits appellant submitted with his motion to vacate were portions of a transcript from the proceedings in Colorado.

{¶ 34} At the very least, a transcript of the 1980 change-of-plea hearings would be required in order to engage in any meaningful review of appellant's ineffective assistance claim. *See Kraatz*, 8th Dist. Cuyahoga No. 103515, 2016-Ohio-2640, at ¶ 12. Without a transcript from the change-of-plea hearings, or an alternative record pursuant to App.R. 9(C) or (D), we are unable to determine the veracity of appellant's assertions. Finally, this court has held that a "'[d]efendant's

own self-serving declarations or affidavits alleging a coerced guilty plea are insufficient to rebut the record on review which shows that his plea was voluntary.'" *State v. Shaw*, 8th Dist. Cuyahoga No. 102802, 2016-Ohio-923, ¶ 10, quoting *State v. Kapper*, 5 Ohio St.3d 36, 448 N.E.2d 823 (1983).

{¶ 35} For all of the foregoing reasons, appellant's second assignment of error is overruled.

III. Conclusion

{¶ 36} After thoroughly reviewing the record, we affirm the trial court's judgment denying appellant's motion to vacate his 1980 guilty pleas. Appellant's challenge to the knowing, intelligent, and voluntary nature of his guilty pleas, and his ineffective assistance of counsel claim are barred by res judicata. Furthermore, appellant has failed to provide this court with a transcript of the change-of-plea hearings. As such, this court must presume regularity.

{¶ 37} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue 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.

FRANK D. CELEBREZZE, JR., JUDGE

MARY EILEEN KILBANE, A.J., and
EILEEN A. GALLAGHER, J., CONCUR