[Cite as *State v. Balch*, 2010-Ohio-3361.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-P-0074**
- vs -	:	
RUSSELL D. BALCH,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2006 CR 0049.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Russell D. Balch, PID: A510-882, Ohio State Penitentiary, 878 Coitsville-Hubbard Road, Youngstown, OH 44505 (Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Russell D. Balch, appeals from the October 26, 2009 judgment entry of the Portage County Court of Common Pleas, denying his second pro se motion to withdraw his guilty plea without a hearing.

{¶2} The following factual background and procedural history were taken from appellant's prior appeal, *State v. Balch*, 11th Dist. No. 2008-P-0014, 2008-Ohio-6780, at ¶2-9:

{¶3} "On February 10, 2006, appellant was indicted by the Portage County Grand Jury on five counts: count one, aggravated vehicular assault, a felony of the second degree, in violation of R.C. 2903.08(A)(1) and (B); count two, aggravated vehicular assault, a felony of the third degree, in violation of R.C. 2903.08(A)(2) and (C); count three, operating a vehicle under the influence of alcohol or drugs, a felony of the third degree, in violation of R.C. 4511.19(A)(1)(a) and (G)(1)(e), and R.C. 2929.13(G)(2); count four, leaving the scene of an accident, a felony of the fifth degree, in violation of R.C. 4549.02; and count five, receiving stolen property, a felony of the fourth degree, in violation of R.C. 2913.51. On April 21, 2006, appellant pleaded not guilty at his arraignment.

{¶4} "On June 5, 2006, appellant withdrew his former not guilty plea and entered an oral and written plea of guilty to counts two, three, four, and five. The trial court accepted appellant's guilty plea and entered a nolle prosequi on count one.

{¶5} "Pursuant to its July 14, 2006 judgment entry, the trial court sentenced appellant to five years in prison on count two, five years on count three, twelve months on count four, and eighteen months on count five, with seventy-nine days of credit for time already served. The sentences were to run concurrent to one another. The trial court also suspended appellant's driver's license for life.

{¶6} "On May 15, 2007, appellant filed a pro se petition for postconviction relief. On June 12, 2007, appellant filed a pro se motion for judicial release pursuant to R.C. 2929.20, which was overruled by the trial court on June 14, 2007. On June 20, 2007, appellee, the state of Ohio, filed a response to appellant's petition for postconviction relief.

{¶7} "Pursuant to its July 27, 2007 judgment entry, the trial court dismissed appellant's petition for postconviction relief, indicating that it was untimely.

{¶8} "On August 9, 2007, appellant filed a second pro se motion for judicial release. The trial court overruled his motion on August 14, 2007.

{¶9} "On January 8, 2008, appellant filed a pro se motion to withdraw his guilty plea based on Crim.R. 32.1, which was overruled without a hearing by the trial court on January 14, 2008.

{¶10} "On January 16, 2008, appellant filed a second pro se motion for postconviction relief, which was overruled without a hearing by the trial court on January 18, 2008."

{¶11} On January 29, 2008, appellant filed a notice of appeal with this court, Case No. 2008-P-0014, from the trial court's January 14, 2008 judgment entry, overruling his motion to withdraw his guilty plea. This court affirmed the judgment of the trial court. *Balch*, 2008-Ohio-6780.

{¶12} While that appeal was pending, appellant filed a pro se motion for delayed appeal with this court, Case No. 2008-P-0050, concerning various post-sentence motions and petitions for postconviction relief. This court dismissed that appeal on August 29, 2008. *State v. Balch*, 11th Dist. No. 2008-P-0050, 2008-Ohio-4416 (O'Toole, J., dissenting).

{¶13} On September 9, 2008, appellant filed a third pro se motion for judicial release, which was overruled by the trial court on September 11, 2008. Appellant filed an appeal with this court, Case No. 2008-P-0108, which we dismissed for failure to prosecute.

{¶14} On September 23, 2009, appellant filed a fourth pro se motion for judicial release, which was overruled by the trial court without a hearing on September 25, 2009.

{¶15} On October 22, 2009, appellant filed a second pro se motion to withdraw his guilty plea.

{¶16} Pursuant to its October 26, 2009 judgment entry, the trial court denied appellant's pro se motion to withdraw his guilty plea without a hearing. It is from that judgment that appellant filed the present appeal, raising the following assignment of error for our review:

{¶17} "The trial court erred in accepting appellant's plea of guilt (sic) as it was not entered knowingly, intellegently (sic), and voluntarily."

{¶18} In his sole assignment of error, appellant argues that the trial court erred by accepting his guilty plea because it was not made knowingly, intelligently, or voluntarily. He asserts two issues: (1) "Whether Defendant is entitled to withdraw his plea where he was not informed of a lifetime driver's license suspension and/or a range of a driver's license suspension to which he pleaded guilty[;]" and (2) "The court's imposition of a lifetime driver's license suspension was excessive, disproportionate to appellant's offenses, and accomplished in violation *** of appellant's constitutional right to due process."

{¶19} Because appellant's two issues are interrelated, we will consider them together.

{¶20} This court stated the following in *Balch*, 2008-Ohio-6780, at ¶14-17:

{¶21} "Crim.R. 32.1 states: '(a) motion to withdraw a 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.'

{¶22} "'An appellate court will review the trial court's determination of the Crim.R. 32.1 motion for an abuse of discretion.' *State v. Desellems* (Feb. 12, 1999), 11th Dist. No. 98-L-053, 1999 Ohio App. LEXIS 458, at 8, citing *State v. Blatnik* (1984), 17 Ohio App.3d 201, 202 ***. 'The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.' *Desellems*, supra, at 8, citing *State v. Montgomery* (1991), 61 Ohio St.3d 410, 413 ***. Regarding this standard, we recall the term 'abuse of discretion' is one of art, essentially connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678 ***.

{¶23} "'Pursuant to Crim.R. 32.1, to withdraw a guilty plea after the imposition of sentence, a defendant bears the burden of proving that such a withdrawal is necessary to correct a manifest injustice.' *State v. Taylor*, 11th Dist. No. 2002-L-005, 2003-Ohio-6670, at ¶8, citing *State v. Smith* (1977), 49 Ohio St.2d 261 ***, at paragraph one of the syllabus. 'A manifest injustice is determined by examining the totality of the circumstances surrounding the guilty plea.' *Taylor* at ¶8, citing *State v. Talanca* (Dec. 23, 1999), 11th Dist. No. 98-T-0158, 1999 Ohio App. LEXIS 6257, ***.

{¶24} "'While a trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of a guilty plea if the request is made before sentencing, the same is not true if the request is made after the trial court

has already sentenced the defendant. *State v. Xie* (1992), 62 Ohio St.3d 521, *** (***), paragraph one of the syllabus. In those situations where the trial court must consider a post-sentence motion to withdraw a guilty plea, a hearing is only required if the facts alleged by the defendant, and accepted as true, would require withdrawal of the plea. Id.' *State v. Wilkey*, 5th Dist. No. CT2005-0050, 2006-Ohio-3276, at ¶25. (Parallel citation omitted.) 'Generally, a self-serving affidavit or statement is insufficient to demonstrate manifest injustice.' Id. at ¶26, citing *State v. Patterson*, 5th Dist. No. 2003CA00135, 2004-Ohio-1569, citing *State v. Laster*, 2d Dist. No. 19387, 2003-Ohio-1564." (Parallel citations omitted.)

{¶25} This court specifically held the following in *Balch*, 2008-Ohio-6780, at ¶88:

{¶26} "In the instant matter, appellant failed to demonstrate that a withdrawal of his guilty plea was necessary to correct a manifest injustice. *** [A]ppellant's plea form specifically notified him that 'the prison term the judge imposes will be the term served' and that 'prison is a mandatory penalty for this offense(.)' The record establishes that appellant knew he was not eligible for probation. Thus, the trial court did not abuse its discretion by denying appellant's post-sentence motion to withdraw his guilty plea."

{¶27} In the case at bar, appellant's present arguments are barred by the doctrine of res judicata. "'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 sic)." *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.

{¶28} Here, because the arguments raised in appellant's second post-sentence motion to withdraw his guilty plea are based on information available to him at the time he filed his first post-sentence motion to withdraw his guilty plea and were or could have been raised at that time, they are now barred by the doctrine of res judicata. We conclude that appellant has failed to satisfy his burden of proving the existence of a manifest injustice. Appellant has not demonstrated that the trial court abused its discretion in denying his second Crim.R. 32.1 pro se motion.

{¶29} Appellant's issues are without merit.

{¶30} For the foregoing reasons, appellant's sole assignment of error is not well-taken. The judgment of the Portage County Court of Common Pleas is affirmed. The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J.,

DIANE V. GRENDELL, J.,

concur.