[Cite as *State v. Billingsley*, 2016-Ohio-8253.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
		CASE NOS. 2016-P-0015
- vs -	:	**2016-P-0016**
DESMOND A. BILLINGSLEY,	:	
Defendant-Appellant.	:	

Criminal Appeals from the Portage County Court of Common Pleas.
Case Nos. 2009 CR 0023 & 2009 CR 0509.

Judgment: Affirmed.

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

Tyler J. Whitney, Burdon & Merlitti, 137 South Main Street, Suite 201, Akron, OH 44308 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Desmond A. Billingsley, appeals the February 12, 2016 judgment of the Portage County Court of Common Pleas denying his motion to vacate his plea pursuant to Crim.R. 32.1. Because appellant's motion is barred by the doctrine of res judicata, we affirm the decision of the trial court.

{¶2} On March 31, 2011, in *State v. Billingsley,* 11th Dist. Portage Nos. 2010-P-0030 & 2010-P-0031, 2011-Ohio-1586, this court affirmed the judgment of the

Portage County Court of Common Pleas denying appellant's motion to enforce a Crim.R. 11 plea agreement negotiated in Summit County. At the time of this previous appeal, appellant was serving an eight-year prison term in Summit County pursuant to a plea agreement with the Summit County Prosecutor. *Id.* at ¶2. Subsequent to the agreement, appellant was indicted in Portage County and ultimately entered a plea of no contest in case No. 2009 CR 00023 for aggravated robbery, a violation of R.C. 2911.01(A)(1) with a firearm specification, and in case No. 2009 CR 00509 for two counts of aggravated robbery with each count carrying a firearm specification.

{¶3} Appellant was sentenced in Portage County to a mandatory prison term of three years for each firearm specification, to be served consecutive to one another, and an eight-year sentence on each felony, to be served consecutive to one another and consecutive to the sentence for the firearm specifications, for a total prison term of 14 years. The 14-year Portage County sentence was to be served concurrent to the eight-year Summit County sentence. On Appeal, appellant maintained that the Portage County Prosecutor was bound by the Summit County plea agreement. Part of appellant's argument was that it was his understanding that, based on the plea agreement at issue, he would receive an eight-year term of imprisonment for all of the robberies in which he was involved. *Id.* at ¶24. We held that the Portage County Prosecutor was not bound by the Summit County plea agreement.

{¶4} Appellant's appeal to the Supreme Court of Ohio was accepted on September 26, 2011. The Supreme Court of Ohio affirmed our judgment in *Billingsley*, holding that "a county prosecuting attorney does not have authority to enter into a plea agreement on behalf of the state for crimes committed wholly outside the county in

which the prosecuting attorney has been elected." *State v. Billingsley*, 133 Ohio St.3d 277, 2012-Ohio-4307, ¶51.

{¶5} On May 28, 2013, appellant filed a pro se motion to withdraw his guilty plea pursuant to Crim.R. 32.1 in Portage County case Nos. 2009 CR 00023 and 2009 CR 00509 due to ineffective assistance of counsel. The trial court denied appellant's motion without hearing on May 31, 2013. There was no appeal of that denial. It is apparent that everything appellant claims in the motion, which is the subject of this appeal, was known to appellant at the time he filed the May 28, 2013 motion.

{¶6} On December 8, 2013, appellant filed a second pro se motion to withdraw his guilty plea pursuant to Crim.R. 32.1. The trial court did not rule on this motion, and no further action was taken with regard to the motion.

{¶7} On April 28, 2014, appellant filed a third pro se Crim.R. 32.1 motion to withdraw his plea of no contest and requested that the court vacate his sentence. The trial court denied appellant's motion without hearing on May 2, 2014.

{¶8} Through counsel, on February 4, 2016, appellant filed a motion to vacate his pleas in case Nos. 2009 CR 00023 and 2009 CR 00509 pursuant to Crim.R. 32.1. The state filed a response to appellant's motion on February 10, 2016. The trial court denied the motion without hearing on February 12, 2016.

{¶9} Appellant filed a timely notice of appeal from the February 12, 2016 judgment of the Portage County Court of Common Pleas denying his motion to vacate his plea pursuant to Crim.R. 32.1.

{¶10} Appellant's sole assignment of error on appeal is that "[t]he trial court erred in denying appellant's motion to vacate his plea."

{¶11} Crim.R. 32.1 provides that "[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."

{¶12} "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. Lake No. 2002-L-005, 2003-Ohio-6670, ¶8, citing *State v. Smith*, 49 Ohio St.2d 261 (1977), paragraph one of the syllabus. "A manifest injustice is determined by examining the totality of the circumstances surrounding the guilty plea." *Id.* (citation omitted).

{¶13} Motions filed pursuant to Crim.R. 32.1 are subject to the doctrine of res judicata. *State v. Gegia*, 11th Dist. Portage No. 2003-P-0026, 2004-Ohio-1441, ¶24 (citations omitted). "Thus, 'when presented with a motion to withdraw a guilty plea * * *, [trial courts and appellate courts] should consider first whether the claims raised in that motion are barred by res judicata.'" *Id.*, quoting *State v. Reynolds*, 3d Dist. Putnam No. 12-01-11, 2002-Ohio-2823, ¶27. If the claim is not barred by res judicata, courts can then apply the manifest injustice standard in accordance with Crim.R. 32.1. *Reynolds*, *supra*, at ¶27.

{¶14} The doctrine of res judicata prevents relitigation of issues that were already decided by a court and litigation of matters that should have been brought in a previous action. *State v. McDonald*, 11th Dist. Lake No. 2003-L-155, 2004-Ohio-6332, ¶21 (citation omitted). "Res judicata bars claims raised in a Crim.R. 32.1 post-sentence motion to withdraw guilty plea that were raised or could have been raised in a prior

proceeding." *Id.* at ¶22 (citation omitted). "A valid final judgment on the merits bars all following actions based upon any claims arising out of the transaction or occurrence that was the subject matter of the previous action." *Id.* at ¶21, citing *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 380 (1995).

{¶15} The application of res judicata is generally a question of law that appellate courts review de novo. *State v. Jenkins*, 10th Dist. Franklin No. 16AP-105, 2016-Ohio-5533, ¶18 (citation omitted).

{¶16} Appellee argues that appellant's motion to vacate his plea is barred by the doctrine of res judicata because it is a successive Crim.R. 32.1 motion. Appellant maintains that "[t]he current motion on appeal raises a completely different issue than the previous two motions[.]"

{¶17} Appellant's first motion to withdraw his guilty plea pursuant to Crim.R. 32.1, filed May 28, 2013, was based upon ineffective assistance of counsel. However, appellant raised the same issue in that motion that he did in his Februrary 4, 2016 motion to vacate his plea: it was his understanding when he entered into the plea agreement in Summit County that if he cooperated with the other jurisdictions in which the robberies at issue occurred, his sentence in those jurisdictions would run concurrent to his sentence in Summit County and his total term of imprisonment across all relevant counties would not exceed eight years.

{¶18} Furthermore, in both his current motion to vacate his plea and in the affidavit attached thereto, appellant summarizes the factual and procedural history of the case and references testimony given at the December 21, 2009 hearing on his motion to enforce the plea agreement. Appellant's affidavit does not set forth new

evidence obtained from the time of his first motion to withdraw his guilty plea filed on May 28, 2013. Finally, appellant did not appeal the denial of his motion to withdraw his plea that was entered in these cases on May 31, 2013. Therefore, he is barred by the doctrine of res judicata from raising that claim in a successive Crim.R. 32.1 motion. *See Jenkins, supra,* at ¶20 (holding a motion which raised essentially the same issues considered and rejected by the trial court in a previous motion was barred by res judicata).

{¶19} Appellant's sole assignment of error is not well taken.

{¶20} The judgment of Portage County Court of Common Pleas is hereby affirmed.

CYNTHIA WESTCOTT RICE, P.J.,

THOMAS R. WRIGHT, J.,

concur.