

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2017-P-0005
MATTHEW M. LUSANE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Municipal Court, Kent Division, Case No. 2005 TRC 4525 K.

Judgment: Affirmed.

Victor V. Viglucci, Portage County Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Matthew M. Lusane, pro se, PID: A660-925, Trumbull County Correctional Institution, P.O. Box 640, 5701 Burnett Road, Leavittsburg, OH 44430 (Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} Appellant, Matthew M. Lusane, appeals the denial of his post-sentence motion to withdraw his no contest plea to operating a motor vehicle while intoxicated, OVI. We affirm.

{¶2} As a result of a traffic stop in September 2005, appellant was arrested and charged with four traffic violations. In December 2005, appellant plead no contest to the OVI offense and the three remaining charges were dismissed.

{¶3} That same day, the trial court issued its final judgment, stating that, in addition to entering the no contest plea to the OVI charge, appellant waived the presentation of evidence and stipulated to a finding of guilt. The court imposed a fine, jail time, and a driver's license suspension.

{¶4} Appellant did not pursue a direct appeal. Five plus years later, in April 2011, he moved to vacate his no contest plea. However, before the court ruled, he voluntarily withdrew the motion. There was no other activity until September 2016, when appellant filed a request for a verbatim transcript of the December 6, 2005 plea hearing and a copy of the underlying police report. Although the filing was not captioned as a motion, the trial court treated it as such and overruled his request stating that the stenographer's notes no longer exist because the case was almost eleven years old and that the trial court is not the custodian of the police report.

{¶5} Within three months, appellant moved to withdraw his no contest plea arguing that in the absence of a transcript of the plea hearing: (1) it cannot be determined if the state provided an adequate explanation of the facts underlying the OVI charge; and (2) it could not be determined if the trial court complied with Crim.R. 11 prior to accepting the no contest plea.

{¶6} Without waiting for the state to respond, the trial court overruled the motion to withdraw in a judgment dated January 4, 2017. The court found appellant signed a written waiver of his rights and was represented by competent counsel when he entered the no contest plea. The court thereafter concluded that appellant could not establish a manifest injustice warranting withdrawal of the plea.

{¶7} In challenging the trial court's ruling, appellant asserts three assignments

for review:

{¶8} “[1.] The trial court erred in denying defendant-appellant’s Crim.R. 32.1 motion where there was absolutely no compliance with Traf.R. 10(C) prior to accepting the plea of no contest.

{¶9} “[2.] The trial court erred in denying defendant-appellant’s Crim.R. 32.1 motion where the record is devoid of any explanation of circumstances, as required by R.C. 2937.07.

{¶10} “[3.] The trial court erred in denying defendant-appellant’s Crim.R. 32.1 motion to withdraw the no contest plea as defendant-appellant has clearly established a manifest injustice.”

{¶11} Appellant’s arguments are barred by res judicata.

{¶12} “[T]he doctrine of res judicata applies to motions to withdraw guilty pleas pursuant to Crim.R. 32.1.” *State v. Cale* (Mar. 23, 2001), 11th Dist. No. 2001-L-034, 2001 Ohio App. LEXIS 1385, at *9; * * *. Thus, “when presented with a motion to withdraw a guilty plea * * *, (appellate courts) should consider first whether the claims raised in that motion are barred by res judicata.” *State v. Reynolds*, 3rd Dist. No. 12-01-11, 2002-Ohio-2823, at ¶27. “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 or conviction, *or on an appeal from that judgment.*” *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus (emphasis sic).’ *State v. Gegia*, 11th Dist. Portage No.

2003-P-0026, 2004-Ohio-1441, ¶24.” *State v. Swift*, 11th Dist. Geauga No. 2014-G-3245, 2015-Ohio-4773, ¶14.

{¶13} When errors could have been asserted and fully considered in a direct appeal of the conviction, they cannot be raised in a post-sentence motion to withdraw. See *State v. Combs*, 11th Dist. Portage No. 2007-P-0075, 2008-Ohio-4158, ¶29, quoting *State v. Lorenzo*, 11th Dist. Lake No. 2007-L-085, 2008-Ohio-1333, ¶20-21. The logic specifically applies to issues regarding the propriety of a plea and compliance with Crim.R. 11. *Id.*; *State v. Lusane*, 11th Dist. Portage No. 2016-P-0036, 2017-Ohio-1513, ¶12.

{¶14} All arguments appellant raised in his motion to withdraw and all issues raised on appeal could have been fully considered in a direct appeal of his conviction.

{¶15} Because the issues raised in his motion to withdraw are barred by res judicata, the trial court’s judgment is affirmed on alternative grounds and all assignments are without merit.

{¶16} The judgment of the Portage County Municipal Court, Kent Division, is affirmed.

TIMOTHY P. CANNON, J., concurs,

COLLEEN MARY O’TOOLE, J., concurs in judgment only.