

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon: W. Scott Gwin, P.J.
	:	Hon: William B. Hoffman, J.
Plaintiff-Appellee	:	Hon: Julie A. Edwards, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-0055
KENNETH E. FLETCHER	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Licking County Court of Common Pleas, Case No. 05CR00121

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: October 19, 2009

APPEARANCES:

For Plaintiff-Appellee

KENNETH OSWALT
Licking County Prosecutor
20 South Second Street
Newark, OH 43055

For Defendant-Appellant

KENNETH E. FLETCHER PRO SE
I.D. No. 508-431
Ross Correctional Institution
Box 7010
Chillicothe, OH 45601

Gwin, P.J.

{¶1} Defendant-appellant Kenneth E. Fletcher appeals a judgment of the Court of Common Pleas of Licking County, Ohio, which overruled his motion to withdraw his guilty plea. Appellant assigns three errors to the trial court:

{¶2} “I. THE HOLDING ESTABLISHED BY THE FIFTH DISTRICT COURT OF APPEALS IN STATE V. GODFREY, (5TH DIST., MAR. 30 2009), 2009 WL 818877 ... AND THE DECISION BY THE OHO SUPREME COURT IN STATE EX REL. SPECIAL PROSECUTORS V. JUDGES, COURT OF COMMON PLEAS, (1978), 55 OHIO ST. 2D 94, MUST BE STRICTLY LIMITED ONLY TO CASES THAT WERE UPHeld ON A DIRECT APPEAL, AND NOT TO CASES THAT WERE FILED IN COLLATERAL POST-CONVICTION PROCEEDINGS. THUS, A COURT OF COMMON PLEAS JUDGE HAS LAWFUL JURISDICTION TO ENTERTAIN A MOTION TO WITHDRAW A GUILTY PLEA, IN CASES WHERE THE DEFENDANT DID NOT FILE A DIRECT APPEAL.

{¶3} “II. THE TRIAL COURT VIOLATED THE DEFENDANT’S DUE PROCESS RIGHTS TO WITHDRAW HIS GUILTY PLEA, PURSUANT TO OHIO CRIM. R. 32.1, WHEN THE TRIAL COURT ERRONEOUSLY ASSUMED THAT IT DID NOT POSSESS LAWFUL JURISDICTION TO ENTERTAIN THE DEFENDANT’S MOTION TO WITHDRAW HIS GUILTY PLEA. THUS, THE TRIAL COURT VIOLATED THE DEFENDANT’S RIGHTS TO DUE PROCESS IN VIOLATION OF ARTICLE I, SECTION 10 AND 16, OHIO CONSTITUTION; AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND VIOLATED THE DEFENDANT’S CONSTITUTIONAL RIGHT TO ACCESS THE COURTS.

{¶14} “III. THE TRIAL COURT VIOLATED THE DEFENDANT’S RIGHTS TO DUE PROCESS, WHEN THE TRIAL COURT FAILED TO CONDUCT AN EVIDENTIARY HEARING ON THE DEFENDANT’S MOTION TO WITHDRAW HIS GUILTY PLEA; AND VIOLATED CHAPTER 120 OF THE OHIO REVISED CODE, FOR FAILING TO APPOINT COUNSEL TO ASSIST THE DEFENDANT AT THE HEARING.”

{¶15} The record indicates on November 22, 2005, appellant pled guilty to various felony counts, and was sentenced to an aggregate term of imprisonment of fourteen years. Appellant did not file a direct appeal, but on May 3, 2007, he filed a motion to vacate the judgment, citing the United States Supreme Court’s decision in *Blakeley v. Washington* (2004), 542 U.S. 296, and the Ohio State Supreme Court’s decision in *State v. Foster* (2006), 109 Ohio St. 3d 1. The trial court overruled appellant’s motion to vacate on June 5, 2007 and appellant filed a notice of appeal to this court on July 13, 2007. We dismissed the appeal for want of a timely notice of appeal, but later granted appellant’s motion for delayed appeal. After appellant failed to file a timely brief, we dismissed the matter for want of prosecution.

{¶16} We later granted appellant’s motion for reconsideration and reinstated his appeal. In December 2007, we affirmed the trial court’s decision in *State v. Fletcher*, Licking App. No. 07-CA-0103, 2007-Ohio-7110, finding *Foster* only applies to cases pending on direct appeal. The Supreme Court refused to review our decision, 118 Ohio St. 3d 1432, and overruled appellant’s motion for reconsideration, 119 Ohio St. 3d 1416.

{¶17} On January 31, 2008, appellant filed a motion for delayed appeal, which we denied on March 14, 2008. Thereafter, on February 28, 2008, appellant moved the trial court to withdraw his guilty plea, citing the same grounds he had presented to this

court as grounds justifying his delayed appeal. After the trial court overruled his motion on April 9, 2009, this appeal ensued.

I, II, & III

{¶8} In each of his assignments of error, appellant challenges the court's decision it lacked jurisdiction to review his motion to withdraw his guilty plea, in violation of his statutory and due process rights and his constitutional right to access to the courts. He also asserts the trial court should have conducted an evidentiary hearing on the motion to withdraw, and should have appointed counsel to assist him.

{¶9} Appellee State of Ohio cites us to *State v. Kovacek*, Lorain App. No. 02CA008115, 2002-Ohio-7003. In *Kovacek*, the Court of Appeals for the Ninth District found a trial court lacks jurisdiction to entertain a motion to withdraw a guilty plea after the judgment of conviction and sentence has been affirmed on direct appeal. *Id.* at paragraph 7, citing *State ex rel. Special Prosecutors v. Judges* (1978), 55 Ohio St. 2d 92, 97, 378 N.E. 2d 162.

{¶10} In *Special Prosecutors*, the Ohio Supreme Court explained that the trial court does retain jurisdiction over issues not inconsistent with the appellate court's review, as in collateral issues such as contempt, appointment of a receiver, or injunction. However, a trial court does not retain jurisdiction to proceed in a manner inconsistent with the appellate court's judgment on direct appeal. The Supreme Court stated Crim. R. 32.1 does not give a trial court jurisdiction to review a motion to withdraw a plea, because a trial court has no power to vacate a judgment which has been affirmed by appellate court.

{¶11} Appellant argues the holdings in *Kovacek* and *Special Prosecutors* should be strictly construed and applied only to cases where the Court of Appeals has reviewed and affirmed the conviction and sentence on direct appeal. Appellant states because he did not pursue a direct appeal his conviction has never been affirmed. The State asserts when we affirmed the trial court's refusal to set aside appellant's conviction, we in essence affirmed the validity of the underlying judgment.

{¶12} The State directs us to appellant's motion for delayed appeal in which he presented claims regarding his sanity, whether his guilty pleas were made knowingly, intelligently or willingly, and whether he received the effective assistance of counsel. Appellant's motion to withdraw the plea also raises the issue of whether his guilty plea was made knowingly, voluntarily, or willingly, because he alleges he was legally insane, and because he was not accorded the effective assistance of counsel.

{¶13} In *State v. Dawson*, Cuyahoga App. No. 87102, 2006-Ohio-3505, the Eighth District Court of Appeals reviewed a situation like the one at bar. The court stated: "We summarily reject all of Dawson's arguments as he is impermissibly using a Crim.R. 32.1 post-sentence motion to withdraw his guilty pleas as a substitute for appeal. See *City of Shaker Heights v. Jackson*, Cuyahoga App. No. 86161, 2006-Ohio-707; *State v. McGuire*, Cuyahoga App. No. 86608, 2006-Ohio-1330. All of the arguments raised in this appeal could have and should have been raised on a direct appeal from his conviction. Instead, Dawson waited two years to file a motion for a delayed appeal. When we denied him leave to file a delayed appeal, he filed the motion currently before us. Nothing contained in that motion is of a character that would demonstrate the requisite 'manifest injustice' required under Crim. R. 32.1. Instead,

Dawson submitted for consideration to the court fairly run-of-the-mill legal arguments relating to the validity of the plea that would ordinarily be raised on direct appeal.”

Dawson, paragraph 2.

{¶14} We agree with the Eighth District’s reasoning. We find the trial court was correct in determining it lacked jurisdiction over the issues appellant attempted to raise in his motion to withdraw his plea. The issues are the same as those appellant raised in his prior appeal before this court.

{¶15} Because the trial court lacked jurisdiction over the matter, it could not conduct an evidentiary hearing, or appoint counsel to assist appellant. Finally, we find the trial court did not violate any of appellant’s due process rights in making the determination it lacked jurisdiction over the matter.

{¶16} Each of appellant’s assignments of error is overruled in whole.

{¶17} For the foregoing reasons, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed.

By Gwin, P.J.,
Hoffman, J., and
Edwards, J., concur

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. JULIE A. EDWARDS

