

[Cite as *State v. Vincent*, 2010-Ohio-3261.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 09CA3135
 :
 vs. :
 :
 WESLEY CONNOR VINCENT, : DECISION AND JUDGMENT ENTRY
 :
 Defendant-Appellant. :

APPEARANCES:

COUNSEL FOR APPELLANT: Thomas M. Spetnagel, 42 East Fifth Street,
Chillicothe, Ohio 45601

COUNSEL FOR APPELLEE: Michael M. Ater, Ross County Prosecuting Attorney,
72 North Paint Street, Chillicothe, Ohio 45601

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 6-30-10

ABELE, J.

{¶ 1} This is an appeal from a Ross County Common Pleas Court judgment that denied a Crim.R. 32.1 motion to withdraw guilty pleas filed by Wesley Connor Vincent, defendant below and appellant herein.

{¶ 2} Appellant assigns the following error for review:

“THE TRIAL COURT ERRED IN OVERRULING
APPELLANT’S MOTION TO WITHDRAW GUILTY PLEAS.”

{¶ 3} In March 1990, appellant shot and killed his wife. The Ross County Grand Jury indicted him on a number of charges including, inter alia, aggravated

murder, attempted aggravated burglary, failure to comply with the order of a police officer and two counts of felonious assault. Appellant initially pled not guilty to the offenses, but later pled guilty when the parties agreed to dismiss the death penalty specification. On January 30, 1991, the trial court sentenced appellant to life imprisonment.

{¶ 4} Although appellant did not appeal the 1991 judgment, he has spent nearly two decades attempting to withdraw his guilty pleas. On May 4, 1992, appellant filed his first motion to “vacate plea.” The trial court overruled that motion and we affirmed the trial court's judgment. See State v. Vincent (Jan. 28, 1993), Ross App. No. 92CA1894 (Vincent I). In 2001, appellant again attempted to withdraw his pleas. The trial court again rejected appellant's motion and we affirmed that decision. See State v. Vincent, Ross App. No. 02CA2654, 2003-Ohio-473 (Vincent II). Two years later appellant again attempted to withdraw his pleas, but with the same outcome. We affirmed that judgment. See State v. Vincent, Ross App. No. 03CA2713, 2003-Ohio-3998 (Vincent III). Appellant again tried in 2007, but the trial court rejected his motion. We affirmed that judgment. See State v. Vincent, Ross App. No. 08CA3041, 2009-Ohio-588 (Vincent IV).

{¶ 5} Appellant commenced the instant action with a fifth (pro se) motion to withdraw his guilty plea. Appellant contends that pursuant to R.C. 2945.06, he was not afforded a three judge panel to first examine the evidence, and then determine his guilt. Appellant argues that he was “persuaded” that a guilty verdict would not be established on the basis of his plea, but rather on the basis of findings made by the panel of judges. The trial court overruled appellant's motion and this appeal followed.

I

{¶ 6} Before we review the merits of the assignment of error, we note that *res judicata* bars appellant from filing a succession of motions to withdraw his guilty pleas. See Vincent IV, supra at ¶7 and Vincent III, supra at ¶¶11-12; State v. Bell (1995) 73 Ohio St.3d 32, 34, 625 N.E.2d 191.

II

{¶ 7} Moreover, even if we considered the merits of appellant's assignment of error, we would affirm the trial court's decision. R.C. 2945.06 states, inter alia, "[i]f the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly." The Ohio Supreme Court has held that any failure to comply with the R.C. 2945.06 three judge panel requirement must be raised on direct appeal. State ex rel. Rash v. Jackson, 102 Ohio St.3d 145, 807 N.E.2d 344, 2004-Ohio-2053, at ¶9. Appellant, however, filed no direct appeal from his judgment of conviction and sentence. Therefore, this issue is barred by the doctrine of *res judicata*. State v. Porterfield, Trumbull App. No. 2008-T-2, 2008-Ohio-5948, at ¶19; State v. Thomson, Lucas App. No. L-05-1213, 2006-Ohio-1224, at ¶28; Pratts v. Hurley, 102 Ohio St.3d 81, N.E.2d 992, 2004-Ohio-1980, at ¶20.¹

¹ Likewise, to the extent appellant claims a failure to follow Crim.R. 11(C), this issue, too, must be raised on direct appeal rather than a motion to withdraw guilty plea. See State v. Minkner, Champaign App. No. 2009CA16, 2009-Ohio-5625, at ¶32, fn. 1; State v. Cochran, Cuyahoga App. Nos. 91768, 91826 & 92171, 2009-Ohio-1693, at ¶17.

{¶ 8} Appellant asserts that the doctrine of res judicata should not apply. He cites State v. Filiaggi (1999), 86 Ohio St.3d 230, 240, 714 N.E.2d 867, for the principle that when a single judge acts on a case, rather than a three judge panel, no final appealable order exists. We note, however, that Filiaggi involved a situation in which a defendant waived a jury and, instead, elected to be tried by a three judge panel. At the conclusion of the trial, all three judges did not agree on the verdict for all charges. Thus, Filiaggi is very different from the case sub judice. Here all charges were resolved during the trial court proceeding.

{¶ 9} Appellant also claims that res judicata should not apply because he received ineffective assistance of appellate counsel. We find no merit to this assertion. First, in light of the fact that appellant did not appeal his original conviction, we question how he could have received ineffective assistance of appellate counsel. Second, even if appellant had appealed his original judgment of conviction and sentence, and even, assuming, arguendo, that he received ineffective assistance from appellate counsel, the proper vehicle to raise that issue is an App.R. 26(B) application to reopen the appeal.

{¶ 10} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Kline, J., concurring.

{¶ 11} I concur in judgment and opinion with Section I. That is, I agree that res judicata bars Vincent's motion to withdraw his guilty pleas. However, in light of

Vincent's numerous appeals, I would not proceed to address the merits of his assignment of error. Therefore, I respectfully concur in judgment only with the rest of the opinion.

JUDGMENT ENTRY

It is ordered the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the procedure.

McFarland, P.J.: Concurs in Judgment & Opinion
Kline, J.: Concurs in Judgment & Opinion with Opinion as to Section I;
Concurs in Judgment Only as to Section II

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.