

[Cite as *State v. Lofton*, 2017-Ohio-757.]

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

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 16CA8
 :
 vs. :
 :
 HARRISON S. LOFTON, IV, : DECISION AND JUDGMENT ENTRY
 :
 Defendant-Appellant. :

APPEARANCES:

Harrison S. Lofton, IV, #A515-249, Marion, Ohio, pro se.

Judy C. Wolford, Pickaway County Prosecuting Attorney, Circleville, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT

DATE JOURNALIZED: 2-16-17

ABELE, J.

{¶ 1} This is an appeal from a Pickaway County Common Pleas Court judgment that denied a motion to allow Harrison S. Lofton, IV, defendant below and appellant herein, to withdraw his guilty plea, entitled “Affidavit of Revocation of Signature for Good Cause.” Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED BY EXCEPTING A PLEA FROM DEFENDANT-APPELLANT, AFTER COLLOQUY IN WHICH JUDGE GAVE INCORRECT INFORMATION REGARDING DEFENDANT-APPELLANT’S STATUS.” (SIC)

SECOND ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED WHEN IT RESPONDED TO DEFENDANT LOFTON’S AFFIDAVIT WITH A DECISION AND ENTRY AND CLAIMED IT WAS A MOTION.”

{¶ 2} On May 6, 2005, the Pickaway County Grand Jury returned an indictment that charged appellant with aggravated murder and burglary. Pursuant to an agreement, appellant pled to an amended charge of murder into which the burglary charge would be merged. In January 2006, the trial court sentenced appellant to serve fifteen years to life in prison. No appeal was taken from that judgment.¹

{¶ 3} A year later, appellant filed a motion to withdraw his guilty plea. Appellant alleged, inter alia, that he received ineffective assistance of trial counsel. The trial court denied his motion and appellant appealed. This court dismissed the appeal due to appellant’s failure to comply with various orders. *State v. Lofton*, 4th Dist. Pickaway No. 08CA23 (Mar. 13, 2009)(*Lofton I*).

{¶ 4} On February 15, 2011, appellant filed a second motion to withdraw his guilty plea. The trial court denied his motion two days later. On June 9, 2011, appellant filed a motion for resentencing, arguing that the trial court erred by imposing postrelease control in its 2006 sentence. The trial court overruled the motion. We, however, reversed the trial court’s judgment on the basis that postrelease control should not have been imposed and we remanded the matter for resentencing. *State v. Lofton*, 4th Dist. Pickaway No. 11CA16, 2012-Ohio-2274, at ¶ 8-10 & 11 (*Lofton II*).

¹We note that this is appellant’s fifth appeal. The facts are largely taken from this court’s most recent decision in *State v. Lofton*, 4th Dist. No. 13CA10, 2014-Ohio-1021.

Thereafter, on May 23, 2012, the trial court corrected its error in a nunc pro tunc entry and removed reference to postrelease control.

{¶ 5} On March 7, 2012, appellant filed a third motion to withdraw his guilty plea. The trial court denied that request on April 26, 2012. We affirmed that judgment. See *State v. Lofton*, 4th Dist. Pickaway No. 12CA11, 2013-Ohio-1120 (*Lofton III*).

{¶ 6} Nearly a month later, appellant filed his fourth motion to withdraw his guilty plea. The trial court overruled the motion, citing *Lofton III*, and concluded that the issues appellant raised in his motion are barred from being raised again under the doctrine of res judicata. We affirmed the trial court's judgment. See *State v. Lofton*, 4th Dist. Pickaway No. 13CA10, 2014-Ohio-1021 (*Lofton IV*).

{¶ 7} On March 14, 2015, appellant filed an "Affidavit of Revocation of Signature for Good Cause" and argued that (1) he signed his guilty plea without knowledge that a fraud was being perpetrated upon him, (2) he was misled and coerced into accepting an invalid sentence, and (3) the trial court breached the plea agreement when it imposed a mandatory term of postrelease control for which appellant was not eligible.

{¶ 8} On March 21, 2016, the trial court concluded that the "Affidavit of Revocation of Signature for Good Cause" amounted to yet another motion to withdraw appellant's guilty plea, and denied the motion. The trial court found no manifest injustice to warrant the withdrawal of appellant's guilty plea after the voluntary giving of such plea. Noting that counsel represented appellant throughout the entire process, the trial court determined that all procedures had been properly followed. Moreover, the court held that the doctrine of res judicata barred appellant from raising an issue in a post-sentence Crim.R. 32.1 motion to withdraw guilty plea that could have been

raised, but was not, on direct appeal. This appeal followed.

I

{¶ 9} For ease of understanding, we address appellant's second assignment of error first. In this appeal of, what is essentially appellant's fifth motion to withdraw his guilty plea, in his second assignment of error appellant argues that the trial court erred by responding to his affidavit with a decision and entry. Appellant argues that the trial court erred when it considered his "Affidavit of Revocation of Signature for Good Cause" as a postconviction motion to withdraw his guilty plea. Appellant contends that "a Motion is a Motion, and a Affidavit is a Affidavit. And a court cannot answer a Affidavit as if it's a motion when the Affidavit is titled 'AFFIDAVIT.'" We agree, however, with the trial court that the assertions in the affidavit amount to a motion to withdraw his plea, regardless of the caption.

{¶ 10} Appellant's motion in the case sub judice actually fails to specify whether it is a postconviction release petition or a Crim.R. 32.1 motion. "Such irregular 'no-name' motions must be categorized by a court in order for the court to know the criteria by which the motion should be judged." *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522, ¶ 10. "Courts may recast irregular motions into whatever category necessary to identify and establish the criteria by which the motion should be judged." *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶ 12, citing *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522, and *State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997).

{¶ 11} After our review of the contents of appellant's "affidavit," we believe that the trial court properly determined that substantively is a motion to withdraw appellant's plea and construed it as such. Thus, we overrule appellant's second assignment of error.

II

{¶ 12} Before we turn to the merits of appellant's first assignment of error, we must first address the appropriate standard of review for a Crim.R. 32.1 motion. As we noted above, although appellant captioned his motion as an "Affidavit of Revocation of Signature for Good Cause," as the trial court surmised, it is the equivalent of a motion to withdraw a guilty plea. The withdrawal of a guilty plea is governed by Crim.R. 32.1: "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." As such, appellant's post-sentence guilty plea in the case at bar can be withdrawn only to correct a "manifest injustice." Crim.R. 32.1. In addition, the decision to grant or to deny a Crim.R. 32.1 motion lies in the trial court's sound discretion and its decision will not be reversed absent an abuse of that discretion. *State v. Xie*, 62 Ohio St.3d 521, 584 N.E.2d 715, at paragraph two of the syllabus (1992); *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph two of the syllabus (1977). Generally, an abuse of discretion implies that a trial court's attitude was unreasonable, arbitrary or unconscionable. *State v. Clark*, 71 Ohio St.3d 466, 470, 644 N.E.2d 331 (1994); *State v. Moreland*, 50 Ohio St.3d 58, 61, 552 N.E.2d 894 (1990). Appellate review under the abuse-of-discretion standard is a deferential review. It is not sufficient for an appellate court to determine that a trial court abused its discretion simply because the appellate court might not have reached the same conclusion or is, itself, less persuaded by the trial court's reasoning process than by the countervailing arguments. *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14, citing *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

{¶ 13} Appellant argues in his first assignment of error that the trial court gave him incorrect information regarding his status when the court incorrectly informed him that he would be subject to a five-year mandatory term of postrelease control. He argues, therefore, that he affixed his signature to the plea agreement “without the knowledge that a fraud was being perpetrated.”

{¶ 14} While it appears that the trial court did initially err in advising appellant that he was subject to a period of postrelease control of five years, this court previously remanded the case to the trial court to modify appellant’s sentence and remove his postrelease control. The trial court corrected the sentence on May 23, 2012 in a nunc pro tunc entry. Further, a review of the initial sentencing entry from January 16, 2006 reveals that the trial court properly advised appellant of his rights and appellant provides no support for his argument that he was coerced or that a fraud was perpetrated.

{¶ 15} Moreover, if appellant believed that he was coerced, he could have raised this issue on direct appeal. Appellant, however, failed to file a direct appeal. The Supreme Court of Ohio has held that under the doctrine of res judicata, “ ‘[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.’ *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 1995-Ohio-331, 653 N.E.2d 226, syllabus. Res judicata promotes the principal of finality of judgments by requiring plaintiffs to present every possible ground for relief in the first action. *Natl. Amusements, Inc. v. Springdale* (1990), 53 Ohio St.3d 60, 62, 558 N.E.2d 1178.” *Kirkhart v. Keiper*, 101 Ohio St.3d 377, 378, 2004-Ohio-1496, 805 N.E.2d 1089. Moreover, res judicata prevents repeated attacks on a final judgment and applies to issues that were or might have been previously litigated. *State v. Sneed*, 8th Dist. Cuyahoga No. 84964, 2005-Ohio-1865, ¶ 16, citing

State v. Brown, 8th Dist. Cuyahoga No. 84322, 2004-Ohio-6421. “Res judicata applies to bar raising piecemeal claims in successive postconviction relief petitions or motions to withdraw a guilty plea that could have been raised, but were not, in the first postconviction relief petition or motions to withdraw a guilty plea.” *State v. Kent*, 4th Dist. Jackson No. 02-CA21, 2003-Ohio-6156, ¶ 6.

{¶ 16} When a defendant files a postconviction motion to withdraw, but fails to raise an issue that could have been raised, the defendant is precluded from raising the issue in a subsequent motion to withdraw. “Indeed, numerous courts have applied the doctrine of res judicata to successive motions to withdraw a guilty plea. See *State v. Brown*, Cuyahoga App. No. 84322, 2004-Ohio-6421 (determining that a Crim.R. 32.1 motion will be denied when it asserts grounds for relief that were or should have been asserted in a previous Crim.R. 32.1 motion); *State v. McLeod*, Tuscarawas App. No. 2004 AP 030017, 2004-Ohio-6199 (holding res judicata barred current challenge to a denial of a motion to withdraw because the issues could have been raised in a defendant’s initial motion to withdraw); *State v. Vincent*, Ross App. No. 03CA2713, 2003-Ohio-3998 (finding res judicata barred defendant from raising issues that could have been raised in a prior motion for a new trial or Crim.R. 32.1 motion); *State v. Reynolds*, Putnam App. No. 12-01-11, 2002-Ohio-2823 (finding that the doctrine of res judicata applies to successive motions filed under Crim.R. 32.1); *State v. Unger*, Adams App. No. 00CA705, 2001-Ohio-2397 (concluding that the defendant’s Crim.R. 32.1 motion was barred by res judicata because she had previously filed a motion to withdraw her guilty plea and she did not appeal prior to filing the second motion to withdraw guilty plea); *State v. Jackson* (Mar. 31, 2000), Trumbull App. No. 98-T-0192 (res judicata applies to successive motions to withdraw a guilty plea filed pursuant to Crim.R. 32.1).” *Sneed* at ¶ 17.

{¶ 17} As we held in *Lofton II*, the proper remedy for the trial court's mis-informing appellant that he was subject to a mandatory term of postrelease control is to remand the matter to the trial court to correct the sentence to eliminate the postrelease control language. That is, in fact, what occurred here. Moreover, in *Lofton IV* we held that *Lofton III's* holding that the trial court's denial of appellant's last motion to withdraw his guilty plea did not constitute an abuse of discretion under Crim.R. 32.1 meant that the issue had been determined and res judicata prevented it from being re-litigated. *Lofton IV* at ¶ 10. Again, because this issue has been determined, res judicata prevents it from being raised again in these proceedings.

{¶ 18} Thus, based upon the foregoing reasons, we find appellant did not meet his burden to establish that a manifest injustice will occur by allowing his plea to stand. Accordingly, we overrule appellant's assignments of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that 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 Pickaway 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 Rules of Appellate Procedure.

McFarland, J. & Hoover, J.: Concur in Judgment & Opinion

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.