

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

STATE OF OHIO,	:	
	:	Case Nos. 19CA9
Plaintiff-Appellee,	:	19CA12
	:	
vs.	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
COLE MIDLAM,	:	
	:	
Defendant-Appellant.	:	Released: 10/10/19

APPEARANCES:

Cole Midlam, London, Ohio, Appellant, Pro Se.

Anneka P. Collins, Highland County Prosecutor, and Adam J. King,
Assistant Highland County Prosecutor, Hillsboro, Ohio, for Appellee.

McFarland, J.

{¶1} This is a consolidated appeal from the Highland County Court of Common Pleas' denial of two post-conviction motions brought by Appellant Cole Midlam. On February 3, 2012, Appellant entered a guilty plea to one count of aggravated robbery in violation of R.C. 2911.01(A)(1). At sentencing, Appellant was sentenced to five years imprisonment and ordered to pay restitution in the amount of \$872.00. Appellant then timely appealed his sentence, which we affirmed on December 28, 2012.

{¶2} Over six years later, on March 22, 2019, Appellant filed a motion to withdraw his guilty plea under Crim.R. 32.1. The trial court denied the motion on March 29, 2019. On May 23, 2019, Appellant filed a motion to vacate, suspend or modify his sentence, which the trial court denied on May 24, 2019. Appellant timely filed a notice of appeal of each of the denials, which we consolidated into one matter for our review.

{¶3} Appellant asserts two assignments of error on appeal, namely that the trial court erred by (1) denying his motion to withdraw his guilty plea and (2) denying his motion to vacate, suspend or modify his sentence. As discussed below, Appellant cannot demonstrate that withdrawal of his plea is necessary to prevent a manifest injustice, as required under Crim.R. 32.1. In addition, his motion to withdraw his plea is premised on an ineffective- assistance-of-counsel claim barred by the doctrine of res judicata. Appellant's first assignment of error is therefore overruled. Appellant's second assignment of error is overruled because he has not identified any error by the trial court, only an administrative error by the Ohio Department of Rehabilitation and Correction ("ODRC"). Accordingly, we affirm the trial court's denial of both motions.

FACTS

{¶4} On May 16, 2010, Appellant entered a Rite Aid store in Hillsboro, Ohio, showed the pharmacist what appeared to be a black handgun, and demanded Oxycontin. The pharmacist gave Appellant 177 pills and Appellant fled the store. On July 6, 2010, a Highland County grand jury indicted Appellant on one count of aggravated robbery in violation R.C. 2911.01(A)(1), a first-degree felony, and a firearm specification in violation of R.C. 2941.145. Pursuant to a plea agreement, the State dismissed the firearm specification and Appellant pleaded guilty to aggravated robbery under R.C. 2911.01(A)(1). The trial court sentenced Appellant to five years of imprisonment, which ran consecutively to sentences for similar offenses entered in Greene and Montgomery Counties, Ohio, and Dearborn County, Indiana. Appellant was also ordered to pay \$872.00 in restitution.

{¶5} He appealed his sentence, arguing the trial court erred in ordering its sentence to run consecutively to the sentences entered in the other jurisdictions. On December 28, 2012, we affirmed the trial court's sentence without modification. Appellant filed a notice of appeal with the Supreme Court of Ohio, which declined to accept the case for review.

{¶6} On January 31, 2017, the trial court held a hearing regarding an error in its sentencing entry relevant to Appellant's post-release control

conditions. The trial court explained that it had discovered, inconsistent with what Appellant was told at his sentencing, its sentencing entry did not state that if Appellant violated the conditions of his post-release control by committing a new felony and is sentenced to an additional prison term for the post-release control violation, such additional prison term would be served consecutively to any prison term imposed for the new felony conviction. Appellant was appointed counsel for purposes of the hearing, after which the trial court entered a nunc pro tunc entry correcting its sentencing entry. No other changes were made to the entry.

{¶7} Appellant claims the trial court's nunc pro tunc entry also changed the date that Appellant is scheduled to be released from prison. The record does not support this claim. When Appellant was taken into custody to serve his sentence, the ODRC incorrectly entered Appellant's release date in its system. Upon receipt of the trial court's nunc pro tunc entry, however, the ODRC realized its error and corrected the release date to accurately reflect the sentence imposed by the trial court.

{¶8} On March 22, 2019, Appellant filed a motion to withdraw his guilty plea under Crim.R. 32.1. The trial court denied the motion on March 29, 2019. On May 23, 2019, Appellant filed a motion to vacate, suspend or modify his sentence, which the trial court denied the next day. Appellant

timely filed notices of appeal of the trial court's denial of each of his motions. We consolidated the appeals into one case, in which Appellant asserts the following two assignments of error.

ASSIGNMENTS OF ERROR

- “1. TRIAL COURT ERRORED [SIC] IN IT'S [SIC] DENIAL OF APPELLANT'S MOTION TO WITHDRAW [SIC] GUILTY PLEA PURSUANT TO CRIMINAL RULE 32.1.
2. TRIAL COURT ERRORED [SIC] IN IT'S [SIC] DENIAL OF APPELLANT'S MOTION SEEKING RELIEF THROUGH MOTION TO VACATE, SUSPEND, OR MODIFY SENTENCE.”

ASSIGNMENT OF ERROR I

{¶9} Appellant's first assignment of error is that the trial court erred when it denied his motion to withdraw his guilty plea. Appellant brought the motion pursuant to Crim.R. 32.1, which states “[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.” A motion under Crim.R. 32.1 “is addressed to the sound discretion of the trial court, and the good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by that court.” *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph two of the syllabus. “An abuse of discretion connotes more than a mere error of

judgment; it implies that the court's attitude is arbitrary, unreasonable, or unconscionable." *State v. Ables*, 4th Dist. Pickaway No. 11CA22, 2012-Ohio-3377, ¶ 9; citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶10} Appellant filed his Crim.R. 32.1 motion more than six years after he was sentenced. We have noted that "Crim.R. 32.1 requires a defendant making a post-sentence motion to withdraw a plea to demonstrate manifest injustice because it is designed to discourage a defendant from pleading guilty to test the weight of potential reprisal, and later withdraw the plea if the sentence was unexpectedly severe." *Ables* at ¶ 10 (internal quotes omitted); quoting *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, 906 N.E.2d 422, ¶ 9; quoting *State v. Caraballo*, 17 Ohio St.3d 66, 67, 477 N.E.2d 627 (1985). "A manifest injustice comprehends a fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the resulting prejudice through another form of application reasonably available to him or her." *State v. Current*, 2nd Dist. Champaign No. 2010 CA 31, 2012-Ohio-1851, ¶ 7.

{¶11} This case presents circumstances similar to those before us in *Ables*. In that case, Ables pleaded guilty to passing bad checks and was sentenced by the trial court. Two years later, he brought a Crim.R. 32.1

motion to withdraw his guilty plea based in part on claims that his attorney made misrepresentations to him and had a conflict of interest. We affirmed the trial court's denial of the motion on two grounds.

{¶12} First, we held that Crim.R. 32.1 was “the improper vehicle for Ables’s ineffective-assistance-of-counsel claim.” Ables’s claims regarding his attorney’s performance, which allegedly influenced his decision to plead guilty, were based on matters outside the record. Those claims therefore should have been raised in a R.C. 2953.21 petition for post-conviction relief. *Ables* at ¶ 12; citing *State v. Whitaker*, 4th Dist. Scioto No. 10CA3349, 2011-Ohio-6923, ¶ 11. Because Ables could have sought redress through another application reasonably available to him, he could not demonstrate a manifest injustice to support his motion to withdraw his plea. *Current* at ¶ 7.

{¶13} Second, we found that res judicata barred Ables’s remaining arguments under Crim.32.1. We noted that the “doctrine of res judicata bars a defendant from raising any 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.” *Ables* at ¶ 14 (internal quotes omitted); quoting *State v. LaPlante*, 4th Dist. Ross No. 11CA3215, 2011-Ohio-6675, ¶ 8. As all of Ables’s additional arguments could have been raised in a direct appeal, they were barred under the doctrine of res judicata.

{¶14} Likewise, in this case, Appellant’s Crim.R. 32.1 motion is based on matters outside the record, specifically his attorney’s alleged advice to him. A petition for post-conviction relief under R.C. 2953.21 was the proper vehicle for Appellant to raise this ineffective-assistance-of-counsel argument; consequently, he cannot demonstrate manifest injustice. *Ables* at ¶ 12. Appellant’s motion is also barred by res judicata because his argument could have been raised on direct appeal. All of the information necessary for him to argue that his counsel was ineffective was available to him on direct appeal in 2012. For both of these reasons, Appellant’s first assignment of error is overruled.

ASSIGNMENT OF ERROR II

{¶15} In his second assignment of error, Appellant contends the trial court erred in denying his motion to vacate, suspend or modify his sentence. The gravamen of Appellant’s motion is that his rights were violated by the ODRC’s correction of his release date after the trial court’s nunc pro tunc entry on January 31, 2017. As a result of the correction, Appellant’s “outdate” changed from June 2021 to June 2026. Appellant specifically argues that the ODRC’s belated correction of his release date caused a delay in the execution of his sentence in violation of his rights under the United States Constitution, Ohio Constitution and Crim.R. 32.

{¶16} Appellant cites several Ohio cases for the proposition that an extensive delay in the execution of a sentence may violate a defendant's federal and state constitutional rights. See *State v. James*, 2008-Ohio-6139, 179 Ohio App.3d 633, 903 N.E.2d 340; *State v. Lovell*, 2007-Ohio-4352; *State v. Zucal*, 1998-Ohio-377, 82 Ohio St.3d 215, 694 N.E.2d 1341; *State v. Patton*, 117 Ohio App.3d 86, 689 N.E.2d 1030 (1996); *Brewster v. Sexton*, 73 Ohio App.3d 777, 598 N.E.2d 204 (1992); *State v. Moore*, 8th Dist. Cuyahoga No. 47284, 1984 WL 5025 (Ohio Ct. App. Mar. 29, 1984). As all of these cases demonstrate, however, the relevant delay is the period between a defendant's sentencing (or when any appeal of the defendant's sentence is exhausted) and when the defendant begins serving the sentence in the state's custody. Here, Appellant does not claim there was any delay between his sentencing and when he began serving his sentence.

{¶17} Instead, Appellant argues the ODRC's delay in entering Appellant's actual release date in its system violated his constitutional rights. The ODRC's administrative error, however, does not implicate the propriety of the trial court's sentence. In *Zucal*, the Supreme Court of Ohio held that "in convictions involving misdemeanor offenses, a delay in execution of sentence resulting from jail overcrowding that exceeds five years from the date that sentence is imposed is unlawful." *Zucal*, 82 Ohio St.3d at 221. It

reasoned that when the State delays execution of a sentence, it nevertheless continues to curtail the defendant's freedom in the same manner as a probationary period. Under R.C. 2951.07, a probationary period cannot exceed five years, subject to certain exceptions that were not relevant to the case. Thus, if a sentence's execution is delayed longer than five years, the defendant has, in effect, been subjected to a probationary period longer than permitted by Ohio law. The delay in execution therefore materially changed the terms of the trial court's sentence, such that "the punishment no longer fits the crime." *Zucal*, 82 Ohio St.3d at 221.

{¶18} In contrast, the ODRC's mistake in entering Appellant's release date did not have any impact on the terms of his actual sentence. Appellant was not subjected to any de facto probationary period because he timely began his sentence—its execution was not delayed. Appellant also has not served any longer in prison than he would have if his release date were properly entered in the first instance. In sum, the ODRC's correction of Appellant's release date did not impose any restriction on Appellant's freedom that had not already been ordered by the trial court.

{¶19} As noted, Appellant filed a direct appeal of the trial court's sentence, which we affirmed. The Supreme Court of Ohio declined review. Appellant's motion to vacate, suspend or modify his sentence is therefore

barred by the doctrine of res judicata. Accordingly, Appellant's second assignment of error is overruled.

{¶20} In conclusion, the trial court did not err in denying Appellant's motion to withdraw his plea because Appellant did not show manifest injustice and his ineffective-assistance-of-counsel argument is barred by the doctrine of res judicata. Appellant's second assignment of error is overruled because Appellant's claim related to the ODRC's administrative error does not implicate the propriety of the trial court's sentence. The motion to vacate, suspend or modify that sentence, which we affirmed on appeal, is barred by the doctrine of res judicata. Accordingly, we affirm the judgment of the trial court as to both motions.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

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

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland, 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.