[Cite as *State v. Jones*, 2020-Ohio-7037.]

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

STATE OF OHIO,	:	
	:	Case No. 19CA9
Plaintiff-Appellee,	:	
	:	
v.	:	DECISION AND JUDGMENT
	:	ENTRY
JASON C. JONES,	:	
	:	
Defendant-Appellant.	:	**RELEASED: 12/30/2020**

APPEARANCES:

Timothy P. Gleeson, Logan, Ohio, for Appellant.

Jason D. Holden, Gallia County Prosecuting Attorney, for Appellee.

Wilkin, J.

{¶1} This is an appeal from a Gallia County Court of Common Pleas judgment denying Appellant Jason C. Jones' motion to withdraw his guilty plea. The State charged Appellant with three criminal counts, including aggravated murder. He filed a pretrial motion for a competency hearing, which was denied by the trial court without a hearing. Appellant subsequently pled guilty to the murder charge. Years later, Appellant filed a motion to withdraw his guilty plea alleging that he was not competent to enter the guilty plea. The trial court denied the motion. On appeal, Appellant asserts that "the trial court erred by denying his motion to withdraw his guilty plea." Based upon our review of the parties' arguments, applicable law, and the record, we overrule Appellant's assignment of error, and dismiss Appellant's appeal on res judicata grounds.

BACKGROUND

{¶2} In October 2007, a grand jury indicted Appellant on charges of aggravated murder in violation of R.C. 2903.01(C), murder in violation of R.C. 2903.02(B), and child endangering in violation of R.C. 2919.22(B)(3) for causing the death of his two-year-old son.

{¶3} On January 8, 2008, Appellant filed numerous motions, including a motion to evaluate his competence to stand trial. On January 18, 2008, the trial court held a pretrial hearing during which the following exchange occurred:

> Judge: "And Mr. Henry (Appellant's counsel), I believe, had indicated that he was going to withdraw the motion for determination of competency of the defendant * * * or was at least contemplating that?"
>
> Mr. Henry: "Yes, Judge, I do need to discuss that additionally with my client."
>
> Judge: "Okay."
>
> Mr. Henry: "But I will let the Court know today."

The case was set for trial on April 7, 2008.

{¶4} On January 25, 2008, the court issued a judgment entry resolving Appellant's pending motions, including denying Appellant's "motion for a psychiatric evaluation to determine [his] competency to stand trial."

{¶5} On March 20, 2008, the court held a pretrial hearing, but the parties indicated that they had reached a plea agreement whereby Appellant pled guilty to murder under R.C. 2903.02(B), which carried a sentence of life in prison with a

possibility of parole in 15 years. In return, the State would dismiss counts one and three of the indictment.

{¶6} The Judge then engaged in a lengthy colloquy asking if Appellant understood: (1) the nature of the charge, (2) that he was not required to plead guilty, (3) that he was giving up the requirement that the State would have to prove all the elements of the offense beyond a reasonable doubt, (4) that he was giving up his right to have a jury trial, (5) that he was giving up his right to self-incrimination (6) that he was giving up his right to subpoena power, (7) that he was giving up his right to examine or cross examine witnesses, (8) that he would be subject to a mandatory sentence of life in prison with a chance of parole after 15 years and (9) that the court could impose that sentence "immediately" after the plea. In each instance, the Appellant responded that he understood each of these issues. The Judge also inquired whether he was satisfied with his counsel's performance and if his plea was voluntary to which he responded "yes." Appellant stated that except for the plea agreement, he was not promised anything or threatened or coerced into accepting the plea. Finally, the Judge asked Appellant if he was "under any mental or physical condition that would render you unable to understand what's happening" to which Appellant responded "No sir." Ultimately, the Judge accepted Appellant's guilty plea. The Appellant signed a document titled "guilty plea" which set forth his plea agreement. On March 21, 2008, the court issued a judgment entry memorializing Appellant's plea and sentencing him to life in prison with the possibility of parole in 15 years.

{¶7} In 2016, approximately eight years after pleading guilty, Appellant sent a letter to the trial court alleging that his trial counsel did not properly represent him in the murder case, noting that his counsel had since been disbarred. Appellant claimed that his counsel "did not explain the law" and that he "felt pressured and unaware of my options during my plea hearing or sentence hearing. I took what my lawyer told me to take." The court interpreted the letter as an ineffective assistance of counsel claim, and treated it as a petition for post-conviction relief. Finding none of the exceptional circumstances that would permit consideration of an untimely filed petition as set out in R.C. 2953.23(A)(1) or (2), the trial court issued an entry on November 30, 2016, that dismissed Appellant's petition.

{¶8} On July 18, 2018, approximately two and a half years after the trial court's dismissal entry was issued, Appellant filed the instant motion to withdraw his guilty plea. The motion alleged that the trial court lacked authority to accept Appellant's plea because it failed to first determine his competency. Appellant alleged that this failure resulted in a manifest injustice to him. The trial court, finding that there was "no indicia in the record that Defendant was incompetent," denied Appellant's motion to withdraw. It is this judgment that Appellant appeals.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA

{¶9} In Appellant's sole assignment of error, he alleges that the trial court erred in denying Appellant's motion to withdraw his guilty plea. He argues that the trial court's failure to order a competency hearing in his murder case was a

"fundamental flaw resulting in a manifest injustice." Appellant argues that there was sufficient indicia of incompetence that required the trial court to order a competency hearing. Therefore, he argues his plea was not knowing, intelligent or voluntary, violating his due process rights.

{¶10} During a pretrial hearing, the Judge asked Appellant's counsel if he still intended to withdraw his motion for a competency hearing to which counsel replied that he needed to discuss it with Appellant. Appellant argues that failing to order a competency hearing was not harmless error under *State v. Bock*, 28 Ohio St.3d 108, 502 N.E.2d 106, but rather was under a prejudicial error under *State v. Were*, 94 Ohio St.3d 173, 2002-Ohio-481, 761 N.E.2d 591. Appellant argues that the dissent in *Bock* reasoned, and the majority in *Were* adopted, the notion that committing the error of not holding a competency hearing harmless "virtually assures there will be little evidence on that issue." Appellant argues that "this court should not follow [*Bock*] and decline to use [*Bock*] to find harmless error."

{¶11} Appellant also cites the subsequent disbarment of his trial counsel and clerical errors in several motions he filed on behalf of Appellant in his murder case, suggesting that his counsel's failure to pursue a competency hearing was the result of his neglect/ineffectiveness.

{¶12} Finally, Appellant argues that res judicata should not bar his appeal of the trial court's denial of his motion to withdraw his plea. Appellant argues that the "trial court could have deprived [him] of any opportunity to present evidence

of incompetency by failing to hold a competency hearing" so applying res judicata would be "far less than fair."

{¶13} Therefore, Appellant argues, this court should reverse the trial court's judgment denying his motion to withdraw his plea and remand the case to the trial court for further proceedings.

{¶14} In response, the State argues that Appellant could have raised the lack of a competency hearing on the direct appeal of his murder case. Therefore, the State argues, res judicata should apply to prevent us from considering his appeal.

{¶15} Alternatively, the State effectively argues that there was no indicia of incompetency, so the trial court's failure to hold a competency hearing was harmless error pursuant to *State v. Bock*, 28 Ohio St.3d 108, 109, 502 N.E.2d 1016 (1986).

{¶16} Finally, the State argues that Appellant's counsel's signature of a certificate that Appellant was competent equates to a stipulation that Appellant was competent.

{¶17} Therefore, the State argues this court should deny Appellant's appeal and affirm the trial court's judgment denying Appellant's motion to withdraw his plea.

LAW

1. Standard of Review for a Motion to Withdraw a Guilty Plea

{¶18} Crim.R. 32.1 permits a defendant to file a motion to withdraw their plea, but distinguishes between presentence and post-sentence motions with the

latter requiring a defendant to establish the "heavy burden to show that extraordinary circumstances exist that amount to a manifest injustice." *State v. Meade*, 4th Dist. Scioto No. 17CA3816, 2018-Ohio-3544, ¶ 17, citing *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus.

{¶19} "The decision to grant or to deny a Crim.R. 32.1 motion lies in a trial court's sound discretion and its decision will not be reversed absent an abuse of that discretion." *State v. Bradford*, 4th Dist. Ross No. 16CA3531, 2017-Ohio-3003, ¶ 34, citing 91 N.E.3d 10, *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). "[A]n abuse of discretion connotes more than an error of judgment; it implies that the trial court's attitude was arbitrary, unreasonable, or unconscionable." *State v. Harmon*, 4th Dist. Pickaway No. 04CA22, 2005-Ohio-1974, ¶ 21, citing, *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

2. Competency to Stand Trial

a. Evaluating Competency

{¶20} "[A] criminal defendant is rebuttably presumed competent to enter a guilty plea." *State v. Collins*, 4th Dist. Lawrence No. 18CA11, 2019-Ohio-3428, ¶ 8, citing R.C. 2945.37(G), *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 45 "The presumption of a defendant's competence * * * is overcome by a showing that he or she is unable to understand the proceedings or assist in his or her defense." *State v. Barnhart*, 4th Dist. Washington No. 96

CA 32, 1997 WL 600045, at *2 (Sept. 24, 1997), citing *State v. Swift*, 86 Ohio App.3d 407, 411, 621 N.E.2d 513 (11th Dist. 1993).

> The test for determining whether a defendant is competent to stand trial [or to plead guilty] is ' ' " whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as a factual understanding of the proceedings against him.' ' " *State v. Collins*, 4th Dist. Lawrence No. 18CA11, 2019-Ohio-3428, quoting *Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 2762, quoting *State v. Berry*, 72 Ohio St.3d 354, 359, 650 N.E.2d 433 (1995), quoting *Dusky v. United States* (1960), 362 U.S. 402, 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960).

We have also recognized some factors that would require a court to sua sponte order a competency including "(1) doubts expressed by counsel as to the defendant's competence, (2) evidence of irrational behavior, (3) the defendant's demeanor at trial, and (4) prior medical opinion relating to competence to stand trial." *State v. Barnhart*, 4th Dist. Washington No. 96 CA 32, 1997 WL 600045, at *2 (Sept. 24, 1997)

{¶21} "The competency standard for standing trial is the same as the standard for pleading guilty," i.e. that a plea is knowing, intelligent, and voluntary. *State v. Mink*, 101 Ohio St. 3d 350, 359, 2004-Ohio-1580805 N.E.2d 1064, 1075, ¶ 57, citing *Godinez v. Moran*, 509 U.S. 389, 399, 113 S.Ct. 2680, 125 L.Ed.2d

321 (1993). "A trial court violates a defendant's due process rights, and hence may produce a manifest injustice, if it accepts a guilty plea that the defendant did not enter knowingly, intelligently, and voluntarily." *State v. Hall*, 4th Dist. Jackson No. 99CA847, *2 (Feb. 25, 2000), citing *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus. Therefore, "the conviction of a defendant who is not competent to enter a plea violates due process of law." *State v. Collins*, 2019-Ohio-3428, ¶ 8, citing *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, at ¶ 155. Conversely, "a defendant who pleads guilty is not entitled to a subsequent competency hearing when the record does not contain a sufficient indicia of incompetence." *State v. Hall*, 4th Dist. Jackson No. 99CA847, 2000 WL 245492, *3 (Feb. 25, 2000), citing *State v. Brookins,* 8th Dist. Cuyahoga No. 73345, 1998 WL 686210, (October 1, 1998).

b. Pretrial Request for a Competency Hearing

{¶22} R.C. 2945.37 (B) states: "In a criminal action in a court of common pleas, * * * the court, prosecutor, or defense may raise the issue of the defendant's competence to stand trial. If the issue is raised before the trial has commenced, the court shall hold a hearing on the issue as provided in this section."

{¶23} Interpreting this same language in former R.C. 2945.37(A), now found in division (B), the Ohio Supreme Court held "there is no question that where the issue of the defendant's competency to stand trial is raised prior to the trial, a competency hearing is mandatory." *State v. Bock*, 28 Ohio St.3d 108, 109, 502 N.E.2d 1018 (1986). In *Bock*, although the trial court ordered a

competency hearing, none was undertaken. *Id*. at 108. But, the Court in *Bock* found that "[t]he record reveals no adequate indication of any behavior on the part of the defendant which might indicate incompetency." *Id.* at 111. For example, the Court found that after an initial filing of a motion for a competency hearing, defense counsel never again raised Appellant's competence until his appeal, and Appellant testified in his own defense. *Id.* Therefore, the Court held that "the failure of the trial court to hold a competency hearing was harmless error and did not interfere with the defendant's right to a fair trial." *Id*.

{¶24} Sixteen years later, the Ohio Supreme Court again visited the issue of competency in *State v. Were*, 94 Ohio St.3d 173, 2002-Ohio-481, 761 N.E.2d 591. Citing *Bock*, the Court confirmed that if a competency hearing is requested before trial, the court must hold a competency hearing. The Court in *Were* found that defense counsel filed a pretrial motion requesting a competency hearing, and the trial court ordered a hearing, but none was held. *Id.* at 174. Unlike in *Bock*, the Court in *Were* found that the record was "replete with suggestions of appellant's incompetency," e.g. defense counsel raised Appellant's competency with the trial court numerous times, letters from Appellant's pro se filings make statements reflecting Appellant's "bizarre belief[s],"such as his attorneys were racially bias, had threatened his life, etc. *Id*. at 175, 176. Accordingly, the Court found that *Bock* was distinguishable on its facts, and the trial court's failure to hold a competency hearing was reversible error. *Id*. at 177.

{¶25} Therefore, contrary to Appellant's argument, both *Bock* and *Were* remain good law, but are factually distinguishable. Accordingly, we decline to

accept Appellant's invitation to reject Bock. Together *Bock* and *Were* effectively instruct that if a pretrial request for a competency hearing is made, it is mandatory for a trial court to hold a competency hearing consistent with R.C. 2945.37. But, if a court fails to hold a competency hearing pursuant to a pretrial request and the record is replete with indicia of incompetency, it is a reversible error under *Were.* Alternatively, if the record does not reveal indicia of incompetency, then the failure to hold a hearing is harmless error under *Bock*.

ANALYSIS

{¶26} Appellant argues that the trial court's denial of his motion to withdraw his plea was a manifest injustice because the trial court in his murder case denied his pretrial motion for a competency evaluation without a hearing despite the existence of indicia of his incompetence in the record. The State argues there was no indicia of incompetence in his murder case, so the trial court's failure to hold a hearing was harmless error under *Bock*. Therefore, the State argues the trial court did not abuse its discretion in denying Appellant's motion to withdraw his guilty plea.

{¶27} While Appellant's counsel did file a motion for a competency hearing, at Appellant's pretrial hearing counsel informed the Judge that he was considering withdrawing the motion. And not only did counsel fail to object to the Judge's denial of the motion several days later, but he subsequently negotiated Appellant's plea bargain with the State. Counsel's actions are not those of an attorney who believed his client was incompetent. See *Bock* at 111 (counsel's

failure to continue to pursue competency evaluation is indicia that Appellant is not incompetent); see also *State v. Moore*, 8th Dist. Cuyahoga No. 2020-Ohio-3459, ¶ 35. (Emphasis original) ("A competency hearing is required only where a competency issue is "raised *and maintained.*").

{¶28} Moreover, The Judge engaged in a lengthy colloquy with the Appellant during the plea hearing. The Judge advised the Appellant that by pleading guilty, he would waive his rights to a jury trial, to cross-examine witnesses, to present a defense, to use the subpoena power, and to present witnesses. The Judge further informed the appellant that by pleading guilty, he would be admitting the truth of the allegations. The Appellant responded that: (1) he understood his rights; (2) he understood the nature of the charges; (3) he entered his pleas voluntarily; and (4) no one threatened him or promised him anything in exchange for his guilty plea. In fact, at one point during the court's explanation, the Appellant stated: "I understand everything completely." The Judge then accepted the appellant's guilty plea. The Judge also asked if he was satisfied with his attorney, to which Appellant responded, yes. And when the Judge asked Appellant whether he was "under any mental or physical condition that would render you unable to understand what's happening," the Appellant responded "No sir." And after the trial judge accepted Appellant's plea and imposed sentence, he informed the Appellant that he had a right to file an appeal and if could not afford an attorney, one would be appointed. The fact that Appellant's plea was knowing, intelligent, and voluntary indicates that he was competent under *Mink*, at ¶ 57.

{¶29} Finally, there is no indication in the record that Appellant acted "irrationally" or that his "demeanor" was unusual, factors that we have recognized as possible competency concerns. *Barnhart*, 4th Dist. Washington No. 96 CA 32, 1997 WL 600045, at *2.

{¶30} Because, after examining the record, we find no indicia that Appellant was incompetent, we hold that the Judge's denial of Appellant's motion for a competency hearing without holding a hearing was harmless error under *Bock*. Therefore, we find that the trial court's denial of Appellant's motion to withdraw his guilty plea on the basis that he was incompetent was not arbitrary, unreasonable, or unconscionable. However, that does not end our analysis.

3. Res Judicata

{¶31} The State argues that res judicata should bar our consideration of Appellant's appeal because he could have raised the competency issue on direct appeal of his plea, but he failed to do so. Appellant admits that "it might have been possible for [him] to raise [the lack-of-a-competency-hearing] argument on direct appeal[]," but adds that "applying res judicata in this case would be unjust." Appellant suggests that applying res judicata would be unjust because "[he] *could* have been sentenced to prison unaware or unable to appreciate his right to advance a direct appeal because of the incompetency issues." (Emphasis added.)

{¶32} "[T]he '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.' " (Emphasis added.) *State v.*

Midlam, 4th Dist. Highland Nos. 19CA9, 19CA12, 2019-Ohio-4254, ¶13, quoting *State v. Ables*, 4th Dist. Pickaway No. 11CA22, 2012-Ohio-3377, ¶ 12. The Ohio Supreme Court recently held that because a defendant did not challenge the trial court's actions that allegedly "prevent[ed] him from making a knowing, intelligent, and voluntary plea" on direct appeal, res judicata barred him from raising that issue in a post-sentence motion to withdraw his plea under Crim.R. 32.1. *State v. Straley*, 159 Ohio St.3d 82, 2019-Ohio-5206, 147 N.E.3d 623, ¶ 23. "[R]es judicata promotes the principles of finality and judicial economy by preventing endless relitigation of an issue on which a defendant has already received a full and fair opportunity to be heard." *State v. Crum,* 4th Dist. Lawrence No. 13CA13, 2014-Ohio-2361, ¶16, quoting *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 18.

{¶33} Although seldom applied, courts have recognized "that in some cases 'circumstances render the application of *res judicata* unjust.' " *State v. Houston*, 73 Ohio St. 3d 346, 347, 1995-Ohio-317, 652 N.E.2d 1018 (1995), quoting *State v. Murnahan*, 63 Ohio St.3d 60, 66, 584 N.E.2d 1204 (1992), see also *State v. Smith*, 4th Dist. Pickaway No. 05CA7, 2006-Ohio-1482, ¶ 27.

ANALYSIS

{¶34} Having found no indicia of incompetence in the record and that Appellant was informed of his appeal rights after the Judge accepted his plea and imposed sentence, we find nothing that would have prevented Appellant from appealing the competency issue in his direct appeal. Yet, Appellant never contested his plea until six years later, after learning that his counsel had been

disbarred in *Disciplinary Counsel v. Henry*, 127 Ohio St. 3d 398, 2010-Ohio-6206, 939 N.E.2d 1255. Appellant then sent a letter to the trial court suggesting that there was "indicia" of his incompetence in the record, and it was not until two years after sending the letter that Appellant filed the motion to withdraw his plea that is at issue in this appeal. The eight-year delay between the trial court's failure to order a competency hearing and Appellant filing his motion to withdraw his plea undermines Appellant's credibility. *State v. Smith*, 49 Ohio St. 2d 261, 264, 361 N.E.2d 1324 (1977), citing *Oksanen v. United States*, 362 F.2d 74 (8 th Cir. 1966). ("[A]n undue delay between the occurrence of the alleged cause for withdrawal and the filing of the motion is a factor adversely affecting the credibility of the movant and militating against the granting of the motion.") (footnote omitted).

{¶36} Appellant appears to suggest that *Henry* supports the proposition that his counsel was ineffective by not pursuing a competency hearing. As we noted above Appellant's counsel was not disbarred until years after he represented Appellant in his murder case, and none of the disciplinary violations that resulted in his disbarment arose from any criminal cases. *Henry*, 127 Ohio St. 3d 398, 2010-Ohio-6206, 939 N.E.2d 1255. Therefore, we reject the notion that *Henry* is in any way applicable to evaluate his motion to withdraw his plea. Nor do we find counsel's clerical errors in some the pleadings filed in Appellant's murder case are pertinent to this appeal. These claims would appear to be more properly raised in an ineffective assistance of counsel claim, and no such claim is before this court on appeal.

{¶37} Accordingly, because Appellant could have raised the competency issue in his direct appeal, we find that our consideration of his appeal of the trial court's denial of his motion to withdraw his plea is barred by res judicata. *State v. Mackey*, 4th Dist. Scioto No. 14CA3645, 2014-Ohio-5372, 2014 WL 6877056, ¶ 15 ("Courts, including this one, have applied res judicata to bar defendants from raising claims in a Crim.R. 32.1 post sentence motion to withdraw that they either raised or could have raised in a direct appeal from their judgment of conviction and sentence.").

CONCLUSION

{¶38} Although we find that the trial court did not abuse its discretion in denying Appellant's motion to withdraw his guilty plea, we decline to consider Appellant's appeal on res judicata grounds. Accordingly, we dismiss Appellant's appeal.

APPEAL IS DISMISSED.

JUDGMENT ENTRY

It is ordered that the APPEAL BE DISMISSED and 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 Gallia County Common Pleas Court 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.

Hess, J.: Concur in Judgment and Opinion.
Abele, J.: Concur in Judgment Only.

For the Court,

BY: _____
Kristy S. Wilkin, 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.