[Cite as *State v. Southers*, 2018-Ohio-321.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 2017-CA-31
	:	
v.	:	Trial Court Case No. 13-CR-97
	:	
JULIUS SOUTHERS	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 26th day of January, 2018.

. . . . . .

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. . . . . .

FROELICH, J.

{¶ 1} Julius Southers appeals from a judgment of the Clark County Court of Common Pleas, which denied, based on res judicata, his second post-sentence motion to withdraw his guilty plea.

{¶ 2} Southers's appellate counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), indicating that he found "no error by the trial court prejudicial to the rights of the Appellant which may be argued to this Court on appeal." We informed Southers that his attorney had filed an *Anders* brief on his behalf and granted him 60 days from that date to file a pro se brief. No pro se brief has been filed.

{¶ 3} Pursuant to *Anders*, we must determine, "after a full examination of all the proceedings," whether the appeal is "wholly frivolous."[1] *Anders*, 386 U.S. at 744; *Penson v. Ohio*, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988). A frivolous appeal is one that presents issues lacking arguable merit, which means that, "on the facts and law involved, no responsible contention can be made that it offers a basis for reversal." *State v. Marbury*, 2d Dist. Montgomery No. 19226, 2003-Ohio-3242, ¶ 8, citing *State v. Pullen*, 2d Dist. Montgomery No. 19232, 2003-Ohio-6078. "If we find that any issue presented or which an independent analysis reveals is not wholly frivolous, we must appoint different appellate counsel to represent the defendant." *Id*. at ¶ 7.

{¶ 4} We have conducted our independent review of the record pursuant to

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[1] In this case, our obligation to examine the record does not require us to review the record as if the matter were a direct appeal of Southers's conviction. Rather, we must consider the record to determine whether there are any non-frivolous issues related to the judgment on appeal, i.e., the denial of Southers's November 2015 motion to withdraw his guilty plea.

Penson, and we agree with appellate counsel that there are no non-frivolous issues for review. Accordingly, the trial court's judgment will be affirmed.

I. Procedural History

{¶ 5} In February 2013, Southers was charged in a 12-count indictment with engaging in a pattern of corrupt activity (Count 1) and eleven predicate acts consisting of burglary (Counts 2, 5, 7, 8, 9, 10, and 11), receiving stolen property (Counts 3 and 6), attempted burglary (Count 4), and theft (Count 12). On August 28, 2013, Southers pled guilty to four counts of burglary (Counts 2, 5, 7, and 8), all felonies of the third degree. The written plea agreement provided that, in exchange for the plea, the State would dismiss the remaining counts, and the parties agreed to a presentence investigation.

{¶ 6} At the beginning of the plea hearing, the trial court orally read the terms of the plea agreement. When asked if those were "all of the terms of the negotiated plea as understood by the State," the prosecutor answered affirmatively. Defense counsel responded:

> They are, Your Honor. I have indicated to [the prosecutor] that I'm going to be asking the Court, as part of the presentence investigation, for an evaluation for the West Central program; and [the prosecutor] is aware of that, I believe doesn't oppose that; but everything else is our complete negotiation.

{¶ 7} During the plea hearing, the court asked Southers if his signature was on the plea form, if he had read the plea form and gone over it with his attorney prior to signing, and whether he understood everything in the document. For each question, Southers responded, "Yes, sir." The court further asked Southers, "Has anyone made any

promises to you other than what's been placed on the record this morning – which is a presentence investigation and dismissal of the other charges in this indictment – to get you to enter this plea?" Southers answered, "No, sir."

{¶ 8} At the conclusion of the hearing, after Southers entered his guilty plea and the court ordered a presentence investigation, the court asked the parties if there was "anything further" to be addressed. Defense counsel responded, "Your Honor, I would, as I had indicated previously, I'd ask that the Court allow [Southers] the opportunity to interview with the West Central program to determine his eligibility for the Court to consider that as an option in his sentence." The court replied, "I'll consider it."

{¶ 9} No evaluation for West Central was conducted during the presentence investigation.

{¶ 10} On September 19, 2013, the trial court conducted a sentencing hearing during which the court imposed the following sentences: (1) Count 2 – two years in prison and restitution of $4,010; (2) Count 5 – two years in prison and restitution of $500; (3) Count 7 – two years in prison and restitution of $2,500; and (4) Count 8 – two years in prison and restitution of $500. The trial court ordered that Southers's prison sentences be served consecutively, for a total of 8 years in prison. A written judgment entry consistent with the orally-imposed sentence was filed on September 24, 2013.

{¶ 11} Southers appealed from his convictions, challenging the trial court's imposition of consecutive sentences. We affirmed the trial court's judgment. *State v. Southers*, 2d Dist. Clark No. 2013-CA-117, 2014-Ohio-5167.

{¶ 12} On January 27, 2015, Southers, pro se, filed a motion to withdraw his guilty plea, pursuant to Crim.R. 32.1. He stated that the plea agreement included an

agreement that he would be evaluated for the West Central program, which was not done. Southers asserted that the prosecutor and the trial court thus breached the plea agreement. Southers supported his motion with his own affidavit, and he cited to the statements made during the plea and sentencing hearings about a West Central evaluation.

{¶ 13} On June 10, 2015, the trial court denied Southers's motion to withdraw his guilty plea. The court found that no manifest injustice had occurred. It further stated that Southers could have raised his claim on direct appeal, but did not, and thus Southers was "barred from raising this argument in a subsequent motion." Southers appealed the trial court's ruling, but he voluntarily dismissed the appeal. *State v. Southers*, 2d Dist. Clark No. 2015-CA-69 (Oct. 22, 2015).

{¶ 14} On November 6, 2015, Southers filed a second motion to withdraw his guilty plea. Southers stated that he obtained a copy of his plea agreement in July 2015 and did not realize until that time that the West Central evaluation was not part of the written plea agreement. Southers claimed that his plea was induced by his attorney's promise that he would receive a West Central evaluation. Southers further alleged that his attorney had said that he (the attorney) was friends with the prosecutor, who was lenient, and that the prosecutor had promised that Southers would be evaluated for West Central. Southers supported the motion with his own affidavit and affidavits from family members. Southers's uncle stated that the prosecutor had assured him that Southers did not deserve prison and that the prosecutor would recommend West Central, and Southers's mother stated that trial counsel had assured her that Southers would be evaluated for West Central.

{¶ 15} On February 22, 2017, the trial court denied Southers's motion. The court noted that Southers had filed "a similar motion" in January 2015, which had been denied. The court ruled that Southers's November 2015 motion was barred by res judicata.

{¶ 16} Southers appeals from the trial court's denial of his second motion to withdraw his guilty plea. Counsel stated, as a potential assignment of error, that the trial court erred by overruling Southers's motion to withdraw his plea without a hearing. The case is now before us for our independent review of the record. *Penson*, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988).

II. *Anders* Review of the Denial of Southers's Motion

{¶ 17} Under Crim.R. 32.1, a trial court may permit a defendant to withdraw a plea after imposition of sentence only to correct a manifest injustice. Crim.R. 32.1; *State v. Wilson*, 2d Dist. Montgomery No. 26354, 2015-Ohio-1584, ¶ 16. "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. Brooks*, 2d Dist. Montgomery No. 23385, 2010-Ohio-1682, ¶ 8, citing *State v. Hartzell*, 2d Dist. Montgomery No. 17499, 1999 WL 957746 (Aug. 20, 1999).

{¶ 18} Withdrawal of a plea after sentencing is permitted only in the most extraordinary cases. *State v. Jefferson*, 2d Dist. Montgomery No. 26022, 2014-Ohio-2555, ¶ 17, citing *State v. Smith*, 49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1977). "The defendant bears the burden of establishing the existence of a manifest injustice, and whether that burden has been met is an issue within the sound discretion of the trial court." *Wilson* at ¶ 18.

{¶ 19} We have discussed the doctrine of res judicata when multiple post-sentence motions to withdraw a plea have been filed, stating:

> The doctrine of res judicata bars a defendant from raising matters in a post-sentence Crim.R. 32.1 motion that " ' "could fairly [have] be[en] determined" in a direct appeal from his conviction, without resort to evidence outside the record.' " Additionally, "if a Crim.R. 32.1 motion asserts grounds for relief that were or should have been asserted in a previous Crim.R. 32.1 motion, res judicata applies and the second Crim.R. 32.1 motion will be denied." "The doctrine of res judicata applies to the second and all successive postsentence motions to withdraw a plea under Crim.R. 32.1, whether the original motion is properly labeled as a Crim.R. 32.1 motion or not."

(Citations omitted.) *State v. Fannon*, 2d Dist. Montgomery No. 25957, 2014-Ohio-2673, ¶ 11.

{¶ 20} Southers's second motion to withdraw his plea alleged that his plea was induced by defense counsel's promise that he would receive a West Central evaluation as part of the presentence investigation, and he claimed that he was not aware that the evaluation was not part of the written plea agreement until July 2015, when he received a copy of the plea form. Even accepting that Southers did not receive a copy of the plea agreement until after the trial court ruled on his first motion to withdraw his guilty plea, the record reflects that Southers had read and signed the plea form at the time of the plea hearing, and Southers was present at the plea hearing, where the terms of the plea were discussed with him. The record indicates that Southers was aware of the contents of the plea form, even if he did not have a copy until July 2015.

{¶ 21} Moreover, Southers knew that a West Central evaluation did not occur prior to his sentencing, and Southers was aware of that fact at the time of the presentence investigation and at sentencing. In both his motions to withdraw his guilty plea, Southers states that he raised the issue of the lack of an evaluation with his defense counsel; specifically, Southers wrote: "At the disposition hearing and prior to, the Defendant informed his Trial Attorney that he hadn't been evaluated for the West Central program." Speaking on Southers's behalf at sentencing, defense counsel reminded the trial court that he had "originally * * * made a request of the Court for a West Central evaluation, and I really think that [Southers] would benefit greatly from that type of program, and I don't believe that that was done in this particular case * * *." Counsel had requested community control with "conditions that would help him resolve some of these issues that, quite frankly, I don't think he's dealt with up to now." Assuming, for sake of argument, that Southers's plea was induced by a promise by defense attorney that Southers would be evaluated for West Central, Southers was aware that he did not receive the benefit of that promise at the time he was sentenced.

{¶ 22} Southers's second motion to withdraw his guilty plea was based on information of which he was aware or should have been aware at the time he filed his first motion to withdraw his guilty plea. Southers therefore could have raised in his first motion to withdraw his plea the issues that he raised in his second motion to withdraw his plea. Southers's second motion to withdraw his plea was barred by res judicata, and the record does not support any arguably meritorious claim to the contrary.

{¶ 23} Finally, we have conducted an independent review of the record and find no non-frivolous issues for appeal. We therefore agree with appellate counsel that

Southers's appeal from the denial of his second motion to withdraw his guilty plea is frivolous.

III. Conclusion

{¶ 24} The judgment of the trial court will be affirmed.

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DONOVAN, J. and TUCKER, J., concur.

Copies mailed to:

Andrew P. Pickering
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Hon. Richard J. O'Neill