

[Cite as *State v. Burnside*, 2010-Ohio-869.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	
)	
PLAINTIFF-APPELLEE,)	
)	
VS.)	CASE NO. 09-MA-133
)	
JOHN BURNSIDE,)	OPINION
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 80CR1131

JUDGMENT: Affirmed

APPEARANCES:
For Plaintiff-Appellee Paul Gains
Prosecutor
Ralph M. Rivera
Assistant Prosecutor
21 W. Boardman St., 6th Floor
Youngstown, Ohio 44503

For Defendant-Appellant John Burnside – pro se
#1797304
U.S. Penitentiary Allenwood
P.O. Box 3000
White Deer, PA 17887

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: March 2, 2010

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DONOFRIO, J.

{¶1} Defendant-appellant John Burnside appeals the denial of his post-sentence motion to withdraw the guilty plea he entered in 1981 to attempted rape. His main argument is that the indictment charging him was illegally amended from rape to attempted rape.

{¶2} In 1980, Burnside was indicted for rape in Mahoning County Common Pleas Court. In 1981, Burnside pleaded guilty to an amended charge of attempted rape and was later sentenced to an indefinite term of five to fifteen years in prison. That sentence was suspended and Burnside served only six months in jail and completed two years probation. He did not appeal his conviction or sentence.

{¶3} In 1997, Burnside filed a pro se mandamus complaint in this court seeking to compel the Mahoning County Common Pleas Court to produce transcripts of the proceedings relating to his conviction for attempted rape and another case. This court dismissed the complaint noting that Burnside had already served his sentence and that there were no actions for postconviction pending. *Burnside v. Mahoning Cty. Common Pleas Court* (Nov. 19, 1998), 7th Dist. No. 97 CA 12.

{¶4} In 2008, Burnside filed a pro se motion in the trial court to expunge his attempted rape conviction. The court overruled the motion and Burnside appealed raising two assignments of error. First, he argued that the court erred in denying the motion to expunge because the court never had personal jurisdiction over the case because of the allegedly illegal indictment. Second, he argued that the court abused its discretion in denying the motion to expunge. This court affirmed the trial court's overruling of the motion to expunge, concluding:

{¶5} “[A]lthough the defective indictment issue could have been raised to challenge Burnside’s conviction within a direct appeal or possibly a petition for post-conviction or habeas relief, it is unfit for resolution in the context of the present appeal. In any event, Burnside’s argument is meritless because amending an indictment to charge attempted rape, instead of rape, absent re-presentment to the grand jury, does not violate Crim.R. 7(D). In addition, the trial court properly denied Burnside’s motion to expunge because his attempted rape conviction is not eligible

for expungement pursuant to both R.C. 2953.36(B) and (D).” *State v. Burnside*, 7th Dist. No. 08 MA 172, 2009-Ohio-2653, ¶24.

{¶6} In another attempt to erase the conviction, Burnside filed a pro se motion to withdraw his guilty plea pursuant to Crim.R. 32.1 on June 17, 2009. Again, Burnside argued that the trial court lost jurisdiction over the case due to the allegedly illegally amended indictment. In response, the state argued that the motion should be denied because this court had already found the illegally amended indictment argument without merit in *State v. Burnside*, 7th Dist. No. 08 MA 172, 2009-Ohio-2653, and that the law of the case doctrine precluded another review of the issue. The state also argued that the motion lacked any substantive or evidentiary support and was untimely. On July 10, 2009, the court overruled the motion to withdraw. Burnside filed the present appeal from that judgment.

{¶7} Burnside’s sole assignment of error states:

{¶8} “THE LAW OF THE CASE DOCTRINE DOES NOT APPLY TO THE COURT OF COMMON PLEAS LOSS OF SUBJECT MATTER JURISDICTION.”

{¶9} As he did in the expungement appeal, Burnside again argues that the indictment was illegally amended rendering the trial court without subject matter jurisdiction to convict him. This time, however, he also argues that because of the illegal indictment, this court too was without jurisdiction to pass on the merits of that issue as it did in the expungement appeal. Therefore, he contends the law of the case doctrine was inapplicable and the trial court was free to allow him to withdraw his guilty plea based on his argument that the indictment had been illegally amended.

{¶10} Burnside’s argument is hopelessly circuitous. This court’s comments on the alleged illegal indictment issue in the expungement appeal were largely dicta. This court clearly stated that the defective indictment issue could have been raised in a direct appeal, postconviction, or habeas. Nonetheless, this court’s comments on the merits of that argument on that issue are still good law. Presented in the context of the present appeal, Burnside’s argument concerning the indictment is still without merit for the same reasons mentioned before.

{¶11} “Burnside’s defective indictment argument is meritless because amending an indictment to charge attempted rape, instead of rape, absent re-presentment to the grand jury is proper. Contrary to Burnside’s assertions, such an amendment does not change the ‘identity of the crime charged,’ and therefore does not violate Crim.R. 7(D). See *State v. Russell* (Oct. 20, 2000), 2d Dist. Nos. 18155, 18194, at *1 (holding that the ‘trial court was allowed to permit amendment of the indictment to charge [the defendant] with an attempt to commit the specific offense with which he was originally indicted without violating Crim.R. 7(D).’)” *State v. Burnside*, 7th Dist. No. 08 MA 172, 2009-Ohio-2653, ¶8.

{¶12} Accordingly, Burnside’s sole assignment of error is without merit.

{¶13} The judgment of the trial court is hereby affirmed.

Vukovich, P.J., concurs.

Waite, J., concurs.