[Cite as *State v. Davis*, 2020-Ohio-4539.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio	Court of Appeals Nos. L-19-1298 L-19-1299
Appellee	Trial Court Nos. CR0201701077 CR0201702181
v.	
Anton M. Davis	**DECISION AND JUDGMENT**
Appellant	Decided: September 11, 2020

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Lauren Carpenter, Assistant Prosecuting Attorney, for appellee.

Britt Newman and Eric Norton, for appellant.

* * * * *

SINGER, J.

{¶ 1} This is a consolidated, accelerated appeal. Appellant, Anton Davis, appeals the November 15, 2019 judgment of the Lucas County Court of Common Pleas, denying appellant's post-sentence motion to withdraw his plea. For the reasons that follow, we find the trial court did not abuse its discretion in denying the motion and therefore affirm the judgment.

{¶ 2} On April 8, 2016, appellant's vehicle was searched during a traffic stop. Law enforcement seized a firearm and a green leafy substance, which was submitted to the Toledo Police Forensic Laboratory for analysis. The analysis found that the items contained controlled substances, specifically MMB-CHMICA. On January 12, 2017, in case No. CR0201701077, appellant was indicted on: one count of carrying concealed weapons in violation of R.C. 2912.12(A)(2) and (F), a felony of the fourth degree; and one count of trafficking in drugs in violation of R.C. 2925.03(A)(2) and (C)(8)(g), a felony of the first degree, with a major drug offender ("MDO") specification attached pursuant to R.C. 2941.1410. At this point, appellant retained counsel and on January 31, 2017, appellant entered a plea of not guilty.

{¶ 3} On March 9, 2017, the Toledo Police executed a search warrant at appellant's residence. Toledo Police seized over 800 grams of synthetic marijuana and drug paraphernalia.

{¶ 4} On April 9, 2017, police made a traffic stop of a vehicle in Toledo, Ohio. Appellant was a passenger in the vehicle. A search was conducted and over 80 grams of synthetic marijuana was seized from the vehicle.

{¶ 5} The items seized, from the two events mentioned above, were submitted to the Toledo Police Forensic Laboratory, and were found to contain controlled substances, specifically 5-Fluoro ADB and MMB-FUBINACA. These substances are commonly known as the drug K2, which is a Schedule I narcotic.

{¶ 6} On April 19, 2017, appellant's counsel filed a motion for independent analysis of controlled substance. On June 27, 2017, the trial court granted appellant's motion to obtain independent testing of the substance found during the search. However, the record lacks information on whether appellant's attorney arranged for the independent testing to be completed.

{¶ 7} On July 11, 2017, in case No. CR0201702181, appellant was indicted on: one count of trafficking in drugs in violation of R.C. 2925.03(A)(2) and (C)(8)(E), a felony of the second degree; one count of possession of a controlled substance in violation of R.C. 2925.11(A) and (C)(8)(d), a felony of the second degree; one count of trafficking in a controlled substance in violation of R.C. 2925.03(A)(2) and (C)(8)(f), a felony of the first degree; one count of possession of a controlled substance in violation of R.C. 2925.11(A) and (C)(8)(d), a felony of the first degree; three counts of trafficking in a controlled substance in violation of R.C. 2925.03(A)(2) and (C)(8)(g), felonies of the first degree, with MDO specifications pursuant to R.C. 2941.1410 attached: three counts of possession of a controlled substance in violation of R.C. 2925.11(A) and (C)(8)(f), felonies of the first degree, with MDO specifications attached pursuant to R.C. 2941.1410; one count of having weapons while under disability in violation of 2923.13(A)(3) and (B), a felony of the third degree; one count of illegal manufacture of drugs, in violation of R.C. 2925.04(A), (C)(1), (C)(2) and (E), a felony of the first degree; one count of illegal assembly or possession of chemicals for the manufacture of drugs in violation of R.C. 2925.041(A), (B), and (C), a felony of the second degree; and one count

of illegal use or possession of drug paraphernalia in violation of R.C. 2925.14(C)(1) and (F), a misdemeanor of the fourth degree. Appellant's girlfriend at the time was indicted as his co-defendant on similar charges, but those charges were later dropped.

{¶ 8} On September 27, 2017, appellant entered two guilty pleas. In case No. CR0201701077, appellant pled guilty to carrying concealed weapons and trafficking in a controlled substance with an MDO specification attached. In exchange, appellee requested a nolle prosequi as to Count 3, appellee's recommendation that the prison sentence would not exceed 14 years when aggregated with case No. CR0201702181, and appellee's silence regarding judicial release. The plea agreement states:

> I understand the nature of these charges and the possible defenses I might have. I am satisfied with my attorney's advice, counsel and competence. I am not now under the influence of drugs or alcohol. No threats have been made to me. No promises have been made except as part of this plea agreement, stated entirely as follows: The State of Ohio will request nolle prosequi as to count three. The State of Ohio will recommend that the prison sentence not exceed 14 years aggregated with CR-17-2181. The State will remain silent regarding judicial release.

{¶ 9} In case No. CR0201702181, appellant pled guilty to two counts of trafficking in a controlled substance; in exchange, appellee requested a nolle prosequi as to all other counts and all specifications, appellee's recommendation that the prison

sentence would not exceed 14 years aggregated with case No. CR0201701077, and appellee's silence regarding judicial release. The plea agreement appellant signed states:

> I understand the nature of these charges and the possible defenses I might have. I am satisfied with my attorney's advice, counsel and competence. I am not now under the influence of drugs or alcohol. No threats have been made to me. No promises have been made except as part of this plea agreement, stated entirely as follows: The State of Ohio will request nolle prosequi as to count 2, 3, 4, the specification attached to count 5, counts 6, 7, 8, 9, 10, and their specifications, and count[s] 11, 12, 13, 14. The State of Ohio will recommend that the prison sentence not exceed 14 years aggregated with CR-17-1077. The State will remain silent regarding judicial release.

{¶ 10} At the plea hearing on September 27, 2017, appellant indicated that he could read, write, understand English, and that he was not under the influence of anything that would affect his ability to understand the proceedings. Appellant confirmed he understood the plea he was entering and the maximum prison terms and fines he could face. Appellant verified that he understood that his guilty plea was a complete admission of guilt. The trial court explained appellant's constitutional rights and appellant indicated he understood by entering the plea, and he waived them. Upon questioning by the trial court, appellant stated that he was satisfied with his attorney's advice and competence, that his attorney had represented him "very well," and that it was in his best interest to

enter the plea agreement. Appellant confirmed no threats had been made in order to induce him into entering the plea. The trial court asked if there were any other representations made to defendant to get him to enter the plea. Appellant explained that he discussed the question with his attorney, stated that he had enough time to discuss the question with his attorney, and answered in the negative. Appellant agreed that he had an opportunity to review the plea forms with his attorney and that he signed them. Appellant stated he did not have any questions about anything that had taken place. The trial court accepted the pleas and found appellant guilty.

{¶ 11} On October 26, 2017, appellant filed a pro se motion to withdraw his plea indicating that: "the plea bargain I took is unacceptable for the crime and is cruel. There are things in the plea that I admitted to doing that I did not do."

{¶ 12} On December 5, 2017, appellant's counsel made a motion to withdraw from representation of appellant, which was granted. Appellant was then appointed new counsel on December 12, 2017, and a hearing on his motion to withdraw his plea was scheduled for January 10, 2018. At the January 10, 2018 hearing, appellant withdrew his motion to withdraw his guilty plea in open court.

{¶ 13} On February 20, 2018, the trial court sentenced appellant, on both case numbers, to: a mandatory term of two years in prison on both counts in case No. CR0201701077, one year on the carrying concealed weapons count, and a mandatory term of 11 years for the trafficking in a controlled substance charge with a MDO

specification attached, to be served concurrently. In the aggregate, the total sentence appellant must serve was 13 mandatory years.

{¶ 14} In May 2019, appellant retained new counsel who on behalf of appellant, filed a second motion to withdraw appellant's plea on May 3, 2019. After approved extensions, appellee filed their response on October 17, 2019. On November 15, 2019, the trial court denied appellant's motion to withdraw his plea.

{¶ 15} This appeal was filed on December 18, 2019, to address whether the trial court erred in denying appellant's motion to withdraw his guilty plea.

Assignments of Error

{¶ 16} Appellant sets forth the following assignment of error:

> The trial court erred when it denied appellant's motion withdraw his guilty plea, especially without the benefit of a hearing.

{¶ 17} Appellant presents four issues for our review: (1) whether the trial court abused its discretion in denying the motion to withdraw on the basis that the trial court did not hold an evidentiary hearing; (2) whether the trial court abused its discretion in denying the motion because appellant's plea was not knowing, voluntarily, or intelligently made; (3) whether the trial court abused its discretion in denying the motion because appellant suffered from ineffective assistance of counsel; and (4) whether the trial court abused its discretion in denying the motion to withdraw on the basis appellant was coerced into entering guilty pleas.

Law

{¶ 18} A direct appeal of right can be made within 30 days of the judgment entry of conviction and sentencing. State v. Reynolds, 3d Dist. Putnam No. 12-01-11, 2002-Ohio-2821, ¶ 12. A criminal defendant can also file a petition for postconviction relief pursuant to R.C. 2953.21. Id. Issues properly raised in a petition for postconviction relief are those which could not have been raised on direct appeal because the evidence supporting such issues is outside the record. State v. Milanovich, 42 Ohio St.2d 46, 50, 325 N.E.2d 540 (1970). R.C. 2953.21, provides that any person who has been convicted of a criminal offense and who claims that his or her rights under the Ohio Constitution or the Constitution of the United States have been infringed such as to render the judgment void or voidable, may file a petition for relief no later than 180 days after the date on which the trial transcript is filed or no later than 180 days after the expiration of the time for filing the direct appeal.

{¶ 19} Here, appellant filed a motion to withdraw a guilty plea, governed by Crim.R. 32.1. This provides: "[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 judgement of conviction and permit the defendant to withdraw his or her plea." State v. Rencz, 6th Dist. Sandusky No. S-16-001, 2016-Ohio-4585, ¶ 6.

{¶ 20} "A defendant who seeks to withdraw a plea of guilty after the imposition of sentence has the burden of establishing the existence of manifest injustice." State v. Smith, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus. The

decision of whether manifest injustice occurred is left to the sound discretion of the trial court. Id. at paragraph two of the syllabus.

{¶ 21} An appellate court reviews the trial court's denial of appellant's motion under an abuse of discretion standard, i.e., whether the trial court's attitude was unreasonable, arbitrary, or unconscionable. State v. Xie, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992), citing State v. Adams, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). The good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by the trial court. Smith at 264.

Analysis

{¶ 22} Appellant argues first that the trial court erred in failing to hold an evidentiary hearing regarding his motion to withdraw his guilty plea.

{¶ 23} A trial court is required to conduct a hearing on a motion to withdraw a guilty plea, if filed before sentencing. State v. Never, 6th Dist. Lucas No. L-08-1076, 2009-Ohio-1473, ¶ 75, citing Xie at paragraph one of the syllabus. However, this court has previously determined that a trial court has no authority to consider whether to deny a motion to withdraw a plea when a judgment in question has been decided and is final. State v. Caston, 6th Dist. Erie No. E-11-077, 2012-Ohio-5260, ¶ 10. We affirmed that "a trial court has no authority to even consider a motion to withdraw a plea after a conviction has been affirmed on appeal; or, if there was no appeal, after the time for filing the original appeal has passed." Id., quoting State v. Carter, 3d. Dist. Allen No.

1-11-36, 2011-Ohio-6104, ¶ 11. No hearing is required on a post-sentence motion under Crim.R. 32.1, unless the facts as alleged by the appellant, taken as true, would require the trial court to permit withdrawal of the plea. State v. Blatnik, 17 Ohio App.3d 201, 204, 478 N.E.2d 1016 (6th Dist.1984).

{¶ 24} While not directly argued by appellant or appellee, the issue we focus on is whether the doctrine of res judicata is applicable to a post-sentence motion to withdraw a guilty plea, filed after the time for direct appeal and postconviction relief. We hold that res judicata does apply to motions filed pursuant to Crim.R. 32.1.

{¶ 25} It is well established, by relevant Ohio caselaw, that claims submitted in support of motions filed pursuant to Crim.R. 32.1 are subject to the doctrine of res judicata. State v. Rock, 11th Dist. Lake No. 2018-L-021, 2018-Ohio-4175 ¶ 9, citing State v. Gegia, 11th Dist. Portage No. 2003-P-0026, 2004-Ohio-1441, ¶ 24. "When presented with a motion to withdraw a guilty plea, [trial courts and appellate courts] should consider first whether the claims raised in that motion are barred by res judicata." State v. Reynolds, 3d Dist. Putnam No. 12-01-11, 2002-Ohio-2823, ¶ 27. If the claim is not barred by res judicata, courts can then apply the manifest injustice standard in accordance with Crim.R. 32.1. Reynolds at ¶ 27.

{¶ 26} The doctrine of res judicata provides that "a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which

resulted in that judgment of conviction, or an appeal from the judgment." State v. Miller, 12th Dist. Clermont No. CA2016-08-057, 2017-Ohio-2801, ¶ 18, citing State v. Szefcyk, 77 Ohio St.3d 93, 671 N.E.2d 233 (1996).

{¶ 27} Application of the doctrine of res judicata prevents relitigation of issues that were already decided by a court and litigation of matters that should have been brought in a previous action. Rock at ¶ 10. "Res judicata bars claims raised in a Crim.R. 32.1 post-sentence motion to withdraw guilty plea that were raised or could have been raised in a prior proceeding." State v. McDonald, 11th Dist. Lake No. 2003-L-155, 2004-Ohio-6332, ¶ 22. See Reynolds at ¶ 14, citing State v. Dick, 137 Ohio App.3d 260, 738 N.E.2d 456 (2000) ("Furthermore, a defendant's failure to appeal a judgment of conviction bars as res judicata any subsequent attempt to litigate issues that could have been raise on direct appeal.").

{¶ 28} Appellant argues that the trial court erred by denying his post-sentence motion to withdraw his guilty plea because the trial court failed to hold an evidentiary hearing regarding his motion; the plea was not knowingly, voluntarily, or intelligently made; he had ineffective assistance of counsel; and he was coerced into entering the guilty pleas. While appellee did not expressly raise a res judicata argument, their claims of untimeliness in filing his motion to withdraw appellant's plea are sufficient to raise such a claim.

{¶ 29} Based on the foregoing, appellant's claims are barred by the doctrine of res judicata. These claims were not raised below or on direct appeal. Accordingly, we find

no error in the trial court's decision denying appellant's post-sentence motion to withdraw his guilty plea without a hearing.

{¶ 30} Based on our review, as appellant's claims were untimely filed, the trial court did not abuse its discretion by denying appellant's motion to withdraw his guilty plea pursuant to Crim.R. 32.1 without a hearing. Furthermore, while each of appellant's arguments are properly brought in a Crim.R. 32.1 motion as an attempt to show manifest injustice, the claims are nevertheless barred. We hold that the trial court did not err in denying the withdrawal of appellant's plea, and thus we find no merit to this assignment of error.

{¶ 31} For the foregoing reasons, the trial court did not abuse its discretion in denying appellant's motion to withdraw his plea. Therefore, appellant's assignment of error is found not well-taken. The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See also 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _______________________________
JUDGE

Arlene Singer, J.
CONCUR. _______________________________
JUDGE

Gene A. Zmuda, P.J. _______________________________
CONCURS AND WRITES JUDGE
SEPARATELY.

ZMUDA, P.J., concurring.

{¶ 32} I agree with the majority's conclusion that the trial court did not abuse its discretion in denying appellant's post-sentence motion to withdraw his plea without holding a hearing, where the arguments asserted by appellant in his motion are barred by res judicata. I write separately to articulate the framework that should be used in cases such as the present one, in which a defendant files a motion to withdraw his plea after failing to file a direct appeal in the underlying case.

{¶ 33} In State v. Tekulve, 188 Ohio App.3d 792, 2010-Ohio-3604, 936 N.E.2d 1030 (1st Dist.), the First District examined whether a trial court may consider a post-sentence motion to withdraw where the defendant does not file a direct appeal of his conviction, and stated:

> [W]hile there is no jurisdictional bar to a trial court's entertaining a postsentence Crim.R. 32.1 motion where there has been no appeal, the doctrine of res judicata does bar a defendant from raising in that motion those matters that "could fairly [have] be[en] determined" in a direct appeal from his conviction, without resort to evidence outside the record. Thus "the doctrine of res judicata is applicable only where issues could have been determined on direct appeal without resort to evidence outside the record." But a defendant who has not taken a direct appeal from his conviction is not barred from raising in his motion matters that depend for their resolution upon outside evidence. (Footnotes and citations omitted.)

Id. at ¶ 5. This approach, which has been followed by at least one other court, State v. Wilson, 2d Dist. Montgomery No. 25482, 2014-Ohio-1764, strikes an equitable balance while adhering to the Supreme Court's decision in State ex rel. Special Prosecutors v. Judges, Court of Common Pleas, 55 Ohio St.2d 94, 378 N.E.2d 162 (1978), in which the Ohio Supreme Court held that a post-sentence motion to withdraw a plea under Crim.R. 32.1 could not be considered by a trial court once the defendant's conviction has been

affirmed on appeal. Moreover, the approach articulated by Tekulve faithfully applies the traditional understanding of the doctrine of res judicata.

{¶ 34} A review of the foregoing case law reveals the following three-step analytical framework, the application of which determines the outcome of this case. In step one, the question is whether the defendant's conviction was appealed and affirmed on appeal? If the answer is yes, then the trial court has no jurisdiction to entertain the post-sentence motion to withdraw under Special Prosecutors. If the answer is no, the court must proceed to step two. In step two, the question is whether the defendant relies upon evidence contained within the trial court record to support his post-sentence motion to withdraw? If the answer is yes, then the defendant's motion is barred by res judicata under Tekulve and its progeny. If the answer is no, the court must proceed to step three. In step three, which is applicable where the defendant did not appeal his conviction and raises arguments to support his post-sentence motion to withdraw that rely upon evidence outside the trial record, the trial court must address the motion on its merits and ascertain whether the defendant should be allowed to withdraw his plea post-sentence in order to correct manifest injustice as provided in Crim.R. 32.1.

{¶ 35} Applying the foregoing analytical framework in this case leads to the conclusion that appellant's arguments in support of his post-sentence motion to withdraw were barred by res judicata. In his May 3, 2019 motion to withdraw his plea, appellant argued that his plea was not entered knowingly, intelligently, and voluntarily. In support of his argument, appellant referenced his lack of understanding that the chemical

substances at issue in this case were not analogs as alleged in the indictment. Appellant claimed that his lack of understanding was the product of his trial counsel's ineffective assistance and lack of communication prior to the plea hearing. Notably, appellant did not rely upon evidence dehors the record in advancing his request to withdraw his plea. Rather, the ineffective assistance argument set forth in appellant's motion was available to appellant during the time period in which appellant could have, but failed to, file a direct appeal. While appellant's conviction was not affirmed on appeal, it is clear that his motion is premised upon evidence contained within the trial record. Consequently, the motion is barred by res judicata.

{¶ 36} In light of the applicability of res judicata to this case, the trial court did not need to proceed to step three and an examination of the merits of the motion, nor did it need to conduct a hearing prior to ruling on appellant's motion. Because the majority reaches the same conclusion, I concur.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.supremecourt.ohio.gov/ROD/docs/.