[Cite as *State v. Johnson*, 2012-Ohio-1400.]

IN THE COURT OF AP0PEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

State of Ohio — Court of Appeals No. OT-11-010

Appellee — Trial Court No. 04CR072

v.

Thomas C. Johnson — **DECISION AND JUDGMENT**

Appellant — Decided: March 30, 2012

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
Andrew M. Bigler, Assistant Prosecuting Attorney, for appellee.

Thomas P. Kurt, for appellant; Thomas C. Johnson, pro se.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} This is an *Anders* appeal. Appellant, Thomas C. Johnson, appeals from the judgment of the Ottawa County Court of Common Pleas denying his Crim.R. 32.1 motion to withdraw his guilty plea. Because we hold that res judicata bars the arguments made by appellant in his motion to withdraw his guilty plea, we affirm.

A. Facts and Procedural Background

{¶ 2} On November 15, 2004, appellant pleaded guilty to one count of rape and one count of kidnapping, both involving his neighbor's three-year-old son. In exchange for the guilty plea, the state agreed to delete the specification from the rape charge that the victim was less than ten years of age. This specification carried with it a penalty of life imprisonment.[1] In addition, the state agreed to dismiss charges of felonious assault and child endangering, second and third-degree felonies respectively.

{¶ 3} The trial court sentenced appellant to the maximum prison term of ten years on each count, and ordered those terms to run consecutively. On direct appeal, appellant challenged his sentence, arguing that the trial court failed both to consider the statutory sentencing factors, and to make the required findings before imposing consecutive sentences. Appellant also argued that the crimes of rape and kidnapping were allied

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[1] R.C. 2907.02 in effect at the time of the offense provided,

> (A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender * * * when any of the following applies:
>
> * * *
>
> (b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.
>
> * * *
>
> (B) Whoever violates this section is guilty of rape, a felony of the first degree. * * * [I]f the victim under division (A)(1)(b) of this section is less than ten years of age, whoever violates division (A)(1)(b) of this section shall be imprisoned for life.

offenses of similar import. This court rejected appellant's arguments, and affirmed the conviction and sentence in *State v. Johnson*, 6th Dist. No. OT-05-008, 2005-Ohio-5029.

{¶ 4} On December 16, 2010, appellant moved to withdraw his guilty plea pursuant to Crim.R. 32.1. Appellant based his motion on allegations that his trial counsel was ineffective for failing to investigate and discover (1) appellant's own childhood history of sexual abuse, (2) appellant's low intelligence and learning disabilities, and (3) appellant's various other psychological syndromes, including Post Traumatic Stress Disorder, Rape Trauma, and Adult Attention Deficit Disorder. The trial court denied appellant's motion on March 29, 2011. In its judgment entry, the court noted that appellant had received a psychological evaluation before entering his guilty plea, that the information appellant claimed his attorney did not discover was information appellant himself possessed, and that appellant's motion to withdraw his guilty plea was filed six years after he was sentenced. Appellant has timely appealed the March 29, 2011 judgment.

B. *Anders* Requirements

{¶ 5} Appointed counsel has filed a brief and requested leave to withdraw as counsel pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Under *Anders*, if, after a conscientious examination of the case, counsel concludes the appeal to be wholly frivolous, he or she should so advise the court and request permission to withdraw. *Id.* at 744. This request must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id.* In addition,

counsel must provide the appellant with a copy of the brief and request to withdraw, and allow the appellant sufficient time to raise any additional matters. *Id.* Once these requirements are satisfied, the appellate court is required to conduct an independent examination of the proceedings below to determine if the appeal is indeed frivolous. *Id.* If it so finds, the appellate court may grant counsel's request to withdraw, and dismiss the appeal without violating any constitutional requirements. *Id.*

{¶ 6} In his brief, counsel asserts two potential assignments of error:

1. The trial court abused its discretion in denying appellant's motion to withdraw his plea.

2. Appellant was denied effective assistance of counsel at sentencing.

{¶ 7} Appellant has also filed a pro se brief, which does not contain additional assignments of error, but which does contain further arguments. The state has not filed a brief in this matter.

{¶ 8} Because the proposed assignments of error are interrelated, we will analyze them together.

II. Analysis

{¶ 9} We review the denial of a Crim.R. 32.1 motion to withdraw a guilty plea under an abuse of discretion standard. *State v. Beachum*, 6th Dist. Nos. S-10-041, S-10-042, 2012-Ohio-285, ¶ 24. Crim.R. 32.1 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 judgment of conviction and permit the defendant to withdraw his or her plea." A defendant who files a post-sentence motion to withdraw a guilty plea bears the burden of establishing the existence of manifest injustice. *State v. Smith*, 49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1977). "Manifest injustice is an extremely high standard, and a defendant may only withdraw his guilty plea in extraordinary cases." *State v. Harmon*, 6th Dist. No. L-10-1195, 2011-Ohio-5035, ¶ 12. Upon our independent review of the record, we hold that the trial court did not abuse its discretion in denying appellant's motion to withdraw his plea because appellant's arguments pertaining to the ineffective assistance of trial counsel are barred by res judicata.

{¶ 10} The doctrine of res judicata precludes a convicted defendant 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 on appeal from that judgment." *State v. Szefcyk*, 77 Ohio St.3d 93, 96, 671 N.E.2d 233 (1996). In this case, appellant bases his motion on the ineffective assistance of trial counsel during the plea negotiations and sentencing. Appellant could have raised these claims during his direct appeal, but did not. Thus, res judicata now bars appellant from raising those claims in his motion to withdraw his guilty plea.

{¶ 11} Further, the claim of ineffective assistance of counsel fails on the merits. In order to prove ineffective assistance, appellant must show that his counsel's

performance fell below an objective standard of reasonableness, and that a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Here, appellant cites as unprofessional errors counsel's failure to investigate potentially mitigating information such as appellant's low intelligence, learning disorders, psychological disorders, and history of sexual abuse. However, the record indicates that counsel moved to have appellant undergo a psychological evaluation to determine his competency to stand trial, and to determine his mental condition at the time of the offense. Moreover, any information regarding appellant's own sexual abuse was known only to himself, and he elected not to reveal that information to counsel. Therefore, we conclude the trial court did not abuse its discretion in finding that appellant failed to demonstrate manifest injustice through his claim of ineffective assistance of counsel.

{¶ 12} As a final matter, in his pro se brief, appellant candidly admits, "vacating the extra ten year sentence lies at the heart of the intent to withdraw the plea * * *." In furtherance of this objective, appellant presents a litany of arguments that were not raised previously in the trial court. Central to all of his arguments is "the single epic fact that the plea was entered with the understanding that the remaining counts of rape and kidnapping would be merged at sentencing * * * [t]hen when the trial court, at sentencing, fails to follow the controlling Supreme Court precedents, the appellant is understandably dumbfounded and in shock." However, appellant's claim of shock is

belied by the following exchange, which occurred immediately prior to appellant entering his guilty plea:

> [Court]. You should also understand that if the sentencing factors indicate it, I could make my sentences on these two counts consecutive. I could make them run back to back, and if I do that, all of it is mandatory, so *you could wind up with a mandatory 20 year prison sentence.* (Emphasis added.) Do you understand that?
>
> [Appellant]. Yes, sir.
>
> [Court]. All right. Let me ask you if you have any questions at all regarding Court Exhibit Number 1, which is your plea agreement, the elements of the two offenses, the possible penalties that I could impose, the concept of Post Release Control or the requirement for a sexual classification hearing.
>
> [Appellant]. No questions.
>
> [Court]. Any questions at all?
>
> [Appellant]. No, sir.

{¶ 13} Moreover, the issue of merger has already been raised by appellant on direct appeal and affirmed by this court. Thus, this issue is settled by the law-of-the-case doctrine, which holds that "the decision of a reviewing court in a case remains the law of that case *on the legal questions involved* for all subsequent proceedings in the case at both the trial and reviewing levels." (Emphasis sic.) *State v. Davis*, 131 Ohio St.3d 1,

2011-Ohio-5028, 959 N.E.2d 516, ¶ 30, quoting *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984).

{¶ 14} Accordingly, the proposed assignments of error as well as appellant's pro se arguments concerning his motions to withdraw his guilty plea are not well-taken.

III. Conclusion

{¶ 15} This court, as required under *Anders*, has undertaken its own examination of the record to determine whether any issue of arguable merit is presented for appeal. We have found none. Accordingly, we grant the motion of appellant's counsel to withdraw.

{¶ 16} The judgment of the Ottawa County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. The clerk is ordered to serve all parties, including Thomas C. Johnson, with notice of this decision.

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.

Peter M. Handwork, J.

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JUDGE

Arlene Singer, P.J.

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JUDGE

Stephen A. Yarbrough, J.
CONCUR.

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JUDGE