

[Cite as *State v. Ikharo*, 2011-Ohio-2746.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 10AP-967
v.	:	(C.P.C. No. 94CR-7-4137)
	:	
Musa A. Ikharo,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 7, 2011

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Brian C. DiFranco, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, Musa A. Ikharo, filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas overruling his motion to withdraw his plea of guilty pursuant to Crim.R. 32.1. For the reasons that follow, we affirm.

{¶2} Appellant is a native of Nigeria who came to the United States in 1980 and whose immigration status was that of a lawful permanent resident. In 1994, appellant was indicted on four counts of rape, one count of felonious sexual penetration, and two counts of gross sexual imposition. On December 14, 1994, appellant agreed to enter pleas of guilty to one count of disseminating matters harmful to juveniles and one count of sexual imposition. The trial court accepted the pleas and sentenced appellant to two years of incarceration on each count to be served concurrently. As a result of his convictions, appellant ultimately became the subject of a Final Order of Removal from the United States.

{¶3} Appellant filed a direct appeal, asserting four assignments of error, including: (1) that his plea was not entered knowingly, voluntarily, and intelligently, based on the trial court's failure to inform him that the convictions could adversely affect his immigration status, as required by R.C. 2943.031, (2) that his right to speedy trial had been violated, and (3) that his right to effective assistance of counsel had been violated when the trial court allowed his trial counsel to withdraw from representation 19 days before the scheduled trial date. We overruled each of appellant's assignments of error and affirmed the trial court's judgment. *State v. Ikharo* (Sept. 10, 1996), 10th Dist. No. 95APA11-1511 ("*Ikharo I*").

{¶4} In 2004, appellant filed a motion to withdraw his plea of guilty pursuant to Crim.R. 32.1. Appellant's arguments included that: (1) the trial court had failed to fully comply with the R.C. 2943.031 requirement of informing him that his plea could

adversely affect his immigration status, and (2) his right to effective assistance of counsel had been violated by counsel's failure to raise a double jeopardy argument. We affirmed. *State v. Ikharo*, 10th Dist. No. 05AP-167, 2005-Ohio-6616 ("*Ikharo II*").

{¶5} In addressing appellant's argument regarding the trial court's failure to inform him of the effect of his convictions on his immigration status, we concluded that this issue had been raised and addressed on direct appeal, and had therefore become the law of the case. *Id.* at ¶9. We rejected appellant's claim of ineffective assistance of counsel because appellant had not properly raised the issue in the Crim.R. 32.1 motion filed with the trial court. *Id.* at ¶12.

{¶6} In September 2010, appellant filed a second motion seeking to withdraw his plea of guilty pursuant to Crim.R. 32.1. Appellant argued that his trial counsel had been ineffective by failing to specifically inform him of the consequences to his immigration status from his entering guilty pleas and by failing to bring to the court's attention a pending motion to dismiss the charges on speedy trial grounds. The trial court denied the motion, finding that the doctrine of *res judicata* barred appellant's second motion to withdraw his guilty pleas.

{¶7} Appellant then filed this appeal, and asserts ten assignments of error:

FIRST ASSIGNMENT OF ERROR

The Trial Court abused its' [sic] discretion and denied appellant due process under the U.S. and Ohio Constitutions by failing to address or otherwise adjudicate a Federal claim presented in Appellant's Motion to Withdraw Guilty Plea specifically pursuant to *Padilla v. Kentucky*, ___ U.S. ___ (2010) 130 S.Ct. 1382 (March 31, 2010). Appellant was

denied effective assistance of counsel. Prior to conviction former Counsel failed to provide Appellant affirmative advice or to assist him upon request whether his guilty plea rendered him Removable from the United States.

SECOND ASSIGNMENT OF ERROR

The Trial Court abused its' [sic] discretion and denied appellant due process under the U.S. and Ohio Constitutions by failing to address the merits of Appellant's speedy trial claim presented in his Motion to Withdraw Guilty Plea, specifying that the trial court in 1994 failed to rule on a properly filed motion to dismiss based on a speedy trial violation and failed to preserve matters for appellate review pursuant to O.R.C. 2945.71-73.

THIRD ASSIGNMENT OF ERROR

The Trial Court abused its' [sic] discretion and denied Appellant due process when it failed to address the Federal question/claim presented pursuant to O.R.C. 2963.30, Art. IV and V, Interstate Agreement of [sic] Detainers. The Trial Court failed to bring Appellant to trial within 120 days and the Trial Court was aware of the issue and awarded Appellant credit on his sentencing.

FOURTH ASSIGNMENT OF ERROR

The Trial Court cannot avoid ruling on a substantive matter and send that matter to the appellate court that is without jurisdiction to determine the matter. The Trial Court failed to address Appellant's filed motion to dismiss for speedy trial and instead the issue only decided [sic] by the appellate court.

FIFTH ASSIGNMENT OF ERROR

The Trial Court was divested of jurisdiction to convict and sentence Appellant on December 14, 1994 when it failed to comply with the mandatory requirements established pursuant to O.R.C. 2963.30, Art. IV and V, the Interstate Agreement on Detainers.

SIXTH ASSIGNMENT OF ERROR

The Trial Court was divested of jurisdiction to convict and sentence Appellant on December 14, 1994 when it failed to comply with the mandatory requirements established pursuant to O.R.C. 2945.71-73, and did not conduct a hearing on Appellant's motion to dismiss for speedy trial violations.

SEVENTH ASSIGNMENT OF ERROR

The Appellant/Defendant's guilty plea was not made knowingly, intelligently and voluntarily.

EIGHTH ASSIGNMENT OF ERROR

The Trial Court abused its' [sic] discretion and prejudiced the Defendant's rights to proper notice when it removed J. Tullis Rogers (0034225) from representation in this matter without specifying or requiring a reason for the removal on the record as required by Local Rule 18.01.

NINTH ASSIGNMENT OF ERROR

Appellant was denied effective assistance of counsel by J. Tullis Rogers and Scott Weisman [] pursuant to State v. Dukes, 34 Ohio App.3d 263, 518 N.E.2d 28 (Ohio App. 8 Dist. 1986). Tullis Rogers disappeared from the case without preserving Appellant's speedy trial rights. Scott Weisman failed to inform Appellant that a motion to dismiss was filed and failed to investigate Appellant's removability from the United States as required by [], Padilla v. Kentucky, ___ U.S. ___ (2010) 130 S.Ct. 1382 (March 31, 2010).

TENTH ASSIGNMENT OF ERROR

Appellant suffered manifest injustice in this matter pursuant to Crim. R. 32.1 where he was compelled to give up one substantive right for another. See United States ex rel. Wilcox v. Johnson, 555 F.2d 115, 120 (3rd Cir.1977) (finding that conditioning the exercise of the right to testify upon waiver of the right to counsel is an impermissible infringement upon both rights).

{¶8} Motions to withdraw pleas of guilty are governed by Crim.R. 32.1, which provides that "[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." Because the motion in this case was made after sentencing, the issue before the trial court was whether granting the motion would correct a manifest injustice. "Manifest injustice relates to some fundamental flaw in the proceedings which result[s] in a miscarriage of justice or is inconsistent with the demands of due process." *State v. Williams*, 10th Dist. No. 03AP-1214, 2004-Ohio-6123, ¶5. A defendant seeking to withdraw a post-sentence guilty plea bears the burden of establishing manifest injustice based on specific facts either contained in the record or supplied through affidavits attached to the motion. *State v. Orris*, 10th Dist. No. 07AP-390, 2007-Ohio-6499.

{¶9} A trial court's decision to deny a post-sentence motion to withdraw a plea of guilty and the decision whether to hold a hearing on the motion are subject to review for abuse of discretion. *State v. Smith* (1977), 49 Ohio St.2d 261. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶10} For ease of discussion, we will group appellant's assignments of error together where common issues exist. In his second, third, fourth, fifth, and sixth assignments of error, appellant takes issue with the time that passed while appellant's case was pending. Appellant points to two separate provisions: R.C. 2945.71 et seq.,

which sets forth the general time frame within which an accused must be brought to trial; and R.C. 2963.30, the Interstate Agreement on Detainers, which sets forth the time for bringing to trial an accused facing charges in Ohio who is being detained in another state, if the accused makes a proper request for disposition of the Ohio charges.

{¶11} We have consistently concluded that res judicata bars a party from raising issues in a post-sentencing Crim.R. 32.1 motion that were or could have been raised in a direct appeal. *State v. Hagler*, 10th Dist. No. 10AP-291, 2010-Ohio-6123; *State v. Hazel*, 10th Dist. No. 08AP-1002, 2009-Ohio-2144; *State v. Conteh*, 10th Dist. No. 09AP-490, 2009-Ohio-6780. Res judicata further acts to bar raising issues in a successive Crim.R. 32.1 motion to withdraw a plea of guilty where those issues could have been raised in the prior Crim.R. 32.1 motion. *State v. Gallegos-Martinez*, 5th Dist. No. 10-CAA-06-0043, 2010-Ohio-6463, ¶12.

{¶12} In this case, appellant raised violation of his speedy trial rights as set forth in R.C. 2945.71 et seq. in his direct appeal, and we found no violation. *Ikharo I* at *13. Thus, res judicata bars further litigation of appellant's claim that his speedy trial rights under the statute were violated. Furthermore, it is clear that appellant could have raised violation of the Interstate Agreement on Detainers either on direct appeal or in his prior Crim.R. 32.1 motion. Consequently, that claim is also barred by res judicata.

{¶13} Accordingly, appellant's second, third, fourth, fifth, and sixth assignments of error are overruled.

{¶14} In his first, seventh, and ninth assignments of error, appellant argues that he was denied the effective assistance of counsel. Specifically, appellant argues that

the first attorney representing him before the trial court "disappeared" while the case was pending without adequately preserving appellant's rights. Appellant further argues that the attorney that represented him after the first attorney was removed did not adequately pursue the motion to dismiss on speedy trial grounds and did not adequately inform him of the consequences of pleading guilty on his immigration status.

{¶15} Appellant's claim of ineffective assistance of counsel arising from his first attorney's withdrawal or removal from representation was raised in his direct appeal, and we found no merit to the claim. *Ikharo I* at *11-12. Res judicata bars further litigation of that claim.

{¶16} As for appellant's claim of ineffective assistance of counsel based on his second attorney's failure to specifically inform him of the consequences to his immigration status of entering a guilty plea, that issue was addressed in both appellant's direct appeal and in his appeal of the trial court's denial of his first Crim.R. 32.1 motion. In *Ikharo I*, we concluded that appellant was adequately informed of the possible effect of the guilty plea on his immigration status by the trial court's substantial compliance with R.C. 2943.031(A), which requires a trial court to inform a non-citizen defendant that a conviction may have adverse consequences for the defendant's immigration status. *Ikharo I* at *10. In *Ikharo II*, we concluded that res judicata barred appellant from continuing to argue the trial court's failure to comply with R.C. 2943.01(A). *Ikharo II* at ¶9.

{¶17} Appellant argues that the trial court's compliance with R.C. 2943.01(A) was irrelevant to his current basis for claiming ineffective assistance of counsel, pointing to the decision by the United States Supreme Court in *Padilla v. Kentucky* (2010), ____

U.S. ___, 130 S.Ct. 1473. *Padilla* involved a defendant whose immigration status was that of a lawful permanent resident. Upon entering a plea of guilty to a drug distribution charge, Padilla was told by his attorney that he did not have to worry about his immigration status as a result of the conviction when, in fact, the conviction was very likely to result in removal from the United States. The court concluded that Padilla had satisfied the deficient performance portion of the test for ineffective assistance of counsel set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. *Padilla* at 1487. The court then remanded the case to determine whether Padilla could satisfy the prejudice portion of the *Strickland* test. *Id.*

{¶18} Appellant argues that *Padilla* creates a duty regarding a defendant's immigration status that differs from the duty set forth in R.C. 2943.01(A) because *Padilla* involved advice given by the defendant's counsel rather than by the court, and the court in *Padilla* concluded that counsel was required to tell the defendant what the precise consequences would be, rather than simply informing the defendant that there may be consequences. Thus, appellant argues that *Padilla* provides a new basis to claim ineffective assistance of counsel that is not affected by our previous decisions rejecting his claims of ineffective assistance.

{¶19} However, even assuming that appellant is correct that res judicata does not bar him from continuing to claim ineffective assistance of counsel, Ohio courts since *Padilla* have concluded that *Padilla* is not implicated in cases where a trial court complied with R.C. 2943.01(A) because a defendant who has been placed on notice that entry of a plea of guilty might have adverse consequences on the defendant's immigration status cannot satisfy the prejudice portion of the *Strickland* test, i.e., that the

defendant would not have entered the guilty plea if the defendant had been informed of the precise consequences that would result. See *State v. Yazici*, 5th Dist. No. 2010CA00138, 2011-Ohio-583, ¶43 ("While [appellant] was not advised deportation would be mandatory upon her conviction, she was aware deportation was a possibility as a consequence of the negotiated plea and a subsequent conviction * * * therefore, has not met the second prong of the *Strickland* test.").

{¶20} In this case, the record shows that at the plea hearing, appellant expressed concern about the possible effect of the plea on his immigration status. However, notwithstanding this expressed concern, there is nothing in the record that would indicate that if appellant had been told that he would, as opposed to might, be removed as a result of his guilty pleas, he would not have agreed to enter the plea. Consequently, even assuming that appellant's continuing claim of ineffective assistance of counsel is not barred by the doctrine of res judicata because *Padilla* provided a new basis for making the claim, appellant cannot show that he was prejudiced as a result of the failure to inform him that he would be subject to removal as a result of his guilty plea.

{¶21} Accordingly, appellant's first, seventh, and ninth assignments of error are overruled.

{¶22} In his eighth assignment of error, appellant argues that the trial court erred when it removed his first attorney, J. Tullis Rogers, 19 days prior to the scheduled trial in this case. This argument differs from the arguments presented in appellant's direct appeal and in his ninth assignment of error in this case, in which he describes attorney Rogers as having "disappeared" while the case was pending, which suggests a more

voluntary act than would be the case if the attorney had been removed from the case. Regardless of the proper characterization, it is clear that appellant could have raised the removal of attorney Rogers as an assignment of error in his direct appeal. Thus, res judicata bars appellant's attempt to argue that the trial court erred by removing attorney Rogers.

{¶23} Accordingly, appellant's eighth assignment of error is overruled.

{¶24} In his tenth assignment of error, appellant argues that a manifest injustice occurred in this case because appellant was placed in a position of having to choose between two constitutional rights during the pendency of this case before the trial court. It is not clear what rights appellant is claiming he was forced to choose between in asserting this assignment of error. In the section of his brief titled "ASSIGNMENTS OF ERROR/ISSUES PRESENTED," appellant states that he was forced to choose between his right to a speedy trial and his right to a full and fair trial. However, appellant does not repeat this argument in the body of his brief, but instead argues under his tenth assignment of error that the trial court erred when it declined to fully address his argument regarding application of *Padilla*.

{¶25} To the extent that appellant's tenth assignment of error continues to argue that his speedy trial rights were violated, we have already concluded that res judicata bars continued litigation of that issue. To the extent that the assignment of error argues that the trial court erred in failing to address his *Padilla* argument, we have concluded that the argument has no merit. Consequently, it could not have been error for the trial court to have failed to address that argument.

{¶26} Accordingly, appellant's tenth assignment of error is overruled.

{¶27} Having overruled appellant's ten assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT, P.J., and DORRIAN, J., concur separately.

BRYANT, P.J., concurring separately.

{¶28} I agree with the majority's conclusion that res judicata bars the issues addressed in ¶11 and 12 but write separately to clarify I do so because the issues either were raised and resolved in appellant's appeal of his guilty plea or were raised or could have been raised in his first motion to withdraw his guilty plea. See *State v. Hall*, 11th Dist. No. 2007-T-0022, 2008-Ohio-2128.

DORRIAN, J., concurring separately.

{¶29} I concur with the majority's conclusion but write separately to clarify that I believe *Padilla v. Kentucky* (2010), ___ U.S. ___, 130 S.Ct. 1473, imposes upon counsel a duty separate and apart from the duty imposed upon the trial court pursuant to R.C. 2943.031(A). Counsel's duty is to "inform her client whether his plea carries a risk of deportation." *Padilla* at 1486. The trial court's duty is to advise defendants: If you are not a citizen of the United States you are hereby advised that conviction of the offense to which you are pleading guilty may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.
